(1)

90-597

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT and ANA C.,

Petitioner,

vs.

MIGUEL T. and LOUISE N.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

Under New York's Domestic Relations Law, the out of wedlock father of a baby placed for adoption at or shortly after birth has the absolute right to veto the adoption if he: (a) openly lives with the mother or the child during the six months before the adoption placement; (b) openly acknowledges his paternity during such period; and (c) pays reasonable pregnancy and birth expenses. The questions presented for review are:

1. Is this provision of the New York Domestic Relations Law violative of the equal protection and/or due process clauses of the Fourteenth Amendment to the Constitution of the United States?

The New York Court of Appeals held that the statute is unconstitutional on its face.

2. Does an out-of-wedlock father, who has failed to form a legal or *de facto* family unit, as defined under the historic practices of our society, have a constitutionally protected liberty interest in developing a future relationship with a newborn infant?

The New York Court of Appeals held that he does.

3. In determining whether the out of wedlock father of a newborn infant should be granted an absolute veto of the adoption of the infant, may the State consider the nature of the relationship between the father and mother?

The New York Court of Appeals held that it may not, not even here, where the mother reported that the child was the product of a rape by the father and where the mother had been repeatedly assaulted prior to, during, and after pregnancy, by the father.

4. Are the liberty interests of out of wedlock fathers in adoption proceedings sufficiently protected by a carefully drawn statutory scheme which liberally grants to broad classes of fathers the right to notice of adoption proceedings and the right to participate in hearings on whether the adoptions are in the children's best interests, though an absolute veto is conferred only in narrower circumstances?

The New York Court of Appeals held that the right to participate in a best interest hearing is insufficient protection.

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Robert and Ana C. petition for a writ of certiorari to review the order of the Court of Appeals of the State of New York which determined that Section 111 (subd. 1 [e]) of the New York Domestic Relations Law violates the provisions of the United States Constitution.

OPINIONS BELOW

The order of the Court of Appeals of the State of New York, entered on July 10, 1990 (A-1), and the accompanying opinion by Judge Judith S. Kaye (A-2), are reported at 76 N.Y.2d 387, 559 N.Y.S.2d 855, 59 U.S.L.W. 2062. The Court of Appeals

reversed the order and opinion of the Appellate Division of New York State Supreme Court, Second Department, entered September 11, 1989 (A-21), which held the statute constitutional, both on its face and as applied. The Appellate Division opinion is reported at 150 A.D.2d 23, 545 N.Y.S.2d 379. This adoption matter originated in the Family Court of the State of New York, County of Westchester, where the trial court, in an unreported decision and order, entered May 10, 1989 (A-30), held the statute to be unconstitutional as applied.

JURISDICTION

This petition for certiorari is from a final order of the Court of Appeals of the State of New York, entered July 10, 1990, which determined that Section 111 (subd. 1 [e]) of the New York Domestic Relations Law is violative of the Constitution of the United States. Jurisdiction to review this determination is conferred upon this Court by 28 U.S.C. §1257 (subd. a) as the decision below is a final determination by the highest court of a State which draws into question the validity of a state statute on the ground of its being repugnant to the federal Constitution.

The Court of Appeals concluded below that, in light of its conclusion that the statute is unconstitutional, it would judicially construct a interim state law standard for measuring whether unwed fathers of newborn infants should be afforded an absolute veto over adoptions. (A-18). This adoption matter was ordered remitted to the Appellate Division, Second Department for a factual determination as to whether Respondent Miguel T. meets the requirements of the interim judicial standard, a question of state law.

The order of the Court of Appeals, notwithstanding its remittitur for further proceedings, is a final order for purposes of 28 U.S.C. §1257. The federal issue (whether Section 111 [1][e] of the Domestic Relations Law violates the United States Constitution) has been finally determined and further review of that issue cannot be had, whatever the ultimate outcome of the case. If Petitioners ultimately prevail on the state law issue on remand, the federal issue will be mooted and Petitioners, as well as

adoptive parents similarly situated, the State and other interested persons, will be deprived of any opportunity to have the federal issue reviewed here – an extreme hardship given the invalidation of an entire statutory scheme. On the other hand, if Respondent Miguel T. prevails on the state law issue, the only further possible review would be by the Court of Appeals which would consider only the state law issue and which would not allow Petitioners to again present the federal issue for review. Under such circumstances, this Court has consistently found finality. *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Florida v. Myers*, 466 U.S. 380 (1984); *New York v. Quarles*, 467 U.S. 649 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975); *California v. Stewart*, 384 U.S. 436, 498 n.71 (1966); *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159-164 (1973); see Stern, Gressman, Shapiro, Supreme Court Practice (6th Ed. 1986), §3:10, pp. 130-131.

CONSTITUTIONAL PROVISIONS INVOLVED

Due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Section 111 of the New York State Domestic Relations Law:

> **§ 111: Whose Consent Required**
>
> 1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
>
> . . .
>
> (e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only

> if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child. . . .

Section 111-a of the New York State Domestic Relations Law:

> **§ 111-a Notice in certain proceedings to fathers of children born out-of-wedlock**
>
> . . .
>
> 2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:
>
> (a) any person adjudicated by a court in this state to be the father of the child; . . .
>
> (g) any person who was married to the child's mother within six months subsequent to the birth of the child. . . .
>
> . . .
>
> 3. The provisions of this section shall not apply to persons entitled to notice pursuant to section one hundred eleven.
>
> The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child. . . .

HOW THE FEDERAL QUESTION WAS RAISED

From the inception of the proceedings below, Respondent Miguel T. asserted a constitutionally based right to veto this adoption. Prior to the commencement of the hearing in Family

Court, Respondent Miguel T. asserted, both orally and in writing, that denying him the absolute right to veto this adoption would violate his rights under the United States Constitution. In so doing, he conceded that he could not meet the criteria fixed by Domestic Relations Law §111 (subd. 1 [e]). The Court of Appeals explicitly wrote in its opinion that its determination was based exclusively on Federal constitutional principles.

STATEMENT OF THE CASE

Domestic Relations Law §111 (subd. 1 [e]) was enacted in the wake of this Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979). In *Caban*, this Court declared the predecessor statute unconstitutional because that statute denied *all* out-of-wedlock fathers the opportunity to veto a proposed adoption. This Court declared that the total exclusion of out-of-wedlock fathers was an "overbroad generalization" that unconstitutionally discriminated "against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child." 441 U.S. at 394. Significantly, Mr. Caban himself had been identified as the father on the children's birth certificate, had actually lived with the children for *over five years*, and had paid support.

Much confusion followed *Caban*. Though *Caban* involved a father who had publicly acknowledged his children, had lived with them for a substantial period of time and paid support for them, some courts read *Caban* as giving *every* father of an out-of-wedlock child the right to veto a proposed adoption. As a result, adoptions were impeded by the need to give notice to, and obtain the consent of, unwed fathers who had not manifested the slightest interest in their children. Other courts held lengthy and protracted hearings into the father's activities during pregnancy and, after hearing the evidence, used entirely subjective criteria to determine whether the father had done enough to fit within *Caban*.

To remedy the statutory void left by *Caban*, New York enacted Dom. Rel. L. §111 (subd. 1 [e]). The new statute sought to make it clear that the father's consent for the adoption of a newborn

is mandatory only where he has developed a protected family relationship, as shown by living with the mother or the child for the prior six months, openly acknowledging the child, and paying for pregnancy and birth expenses.

The enactment of §111 (1) (e) not only accommodated the constitutional rights of unwed fathers but also promoted adoption and protected the rights of adoptive children and adoptive families to have their futures decided expeditiously and finally. The Court of Appeals, in misplaced reliance upon this Court's prior precedents, has displaced the carefully drafted, objective statutory criteria for measuring whether an unwed father has manifested such a true and real commitment to a unitary family as to be entitled to a veto of the adoption of the child.

The Court of Appeals has totally misconstrued this Court's prior decisions in *Caban* and in *Lehr v. Robertson*, 463 U.S. 248 (1983) where this Court sustained part of the statutory scheme at issue herein. Most critically, the Court of Appeals entirely rejected the analysis of this Court's prior decisions which was provided by the plurality opinion by Justice Antonin Scalia in last Term's decision in *Michael H. v. Gerald D.*, ____ U.S. ____, 109 S.Ct. 2333 (1989). Justice Scalia held that *Caban*, *Lehr*, and the other leading precedents of this Court recognized the liberty interests of unwed fathers, not in isolation, but only where their relationship "has been treated as a protected family unit under the historic practices of our society. . . ." 109 S.Ct. at 2342. The cohabitation requirement imposed by the statute here is entirely in keeping with this analysis. As found by the Appellate Division below, §111 (subd. 1 [e]) "serves the salutary purpose of ensuring that the consent of an unmarried father to an adoption will be required where a meaningful family relationship has been established". (A-25).

Particularly appalling is the conclusion of the Court of Appeals that this Court's prior precedents preclude consideration of the relationship between the unmarried father and unmarried mother. (A-16). In so holding, the Court of Appeals all but ignored Justice Scalia's admonition against viewing a liberty interest "in isolation from its effect upon other people. . . ." 109

S.Ct. at 2343 n.4. Of special importance here, Justice Scalia specifically rejected the notion that a rapist, by impregnating his victim, may forge a liberty interest unaffected by the brutality exhibited by father against mother. *Id.*

The Court of Appeals' invalidation of §111 (subd. 1 [e]) could hardly have been made in a more inappropriate case, given the violent and abusive nature of the unwed father's conduct toward the biological mother which caused the pregnancy and which continued during pregnancy. As the Appellate Division duly noted, the child was, according to the biological mother, the product of a rape by Respondent Miguel T.; Miguel T. brutally assaulted the biological mother on several different occasions (some during the pregnancy), leading to numerous orders of protection (which he violated) and to criminal convictions; he failed to pay child support, leading to Family Court proceedings; he failed to assist the biological mother in caring for the child, and, because the biological mother could not care for the child, the child was placed, first in boarding care and later for adoption. (A-22, A-23); 150 A.D.2d at 25, 545 N.Y.S.2d at 381.

That the Appellate Division found the relationship to be "tumultuous" and the conduct of Appellant to be "violent" (A-28) is entirely consistent with the findings of the Family Court. That Court described the relationship as "turbulent" (A-36), finding that the biological parents "were suspicious of one another"; "didn't trust one another"; and did not have "total obligation" to each other. (*Id.*). Indeed, the Court specifically found that their relationship "could in no way be characterized as 'normal or stable'". (A-36). Even Respondent Miguel T. conceded below that, as late as five months after the child's birth and more than three months after the child's placement for adoption, there was no "intact" family. (Tr. B438).

That this Court's precedents could be construed to mandate the recognition of a veto right in these circumstances will have tragic implications, and not just in this case, and not just within the State of New York. The decision below compels a cruel choice for unwed mothers: abort the child during pregnancy, offer an

unwanted man a substantial role in her life, or unhappily keep an unwanted child. Adoptive parents are also placed in grave jeopardy: offer a loving home to an unwanted child but risk having the child wrenched away as the result of protracted litigation, over events not within their personal knowledge, and determined by nebulously subjective criteria. If adoptive parents willing to run such terrible risks cannot be found, children badly in need of stable, loving home environments will be at risk.

The decision of the Court of Appeals below, if allowed to stand unreviewed, will influence courts and legislatures in other states as to the proper construction and effect to be given this Court's prior precedents. This Court should not — and cannot — remain silent in the face of a decision which so violently mangles its prior precedents.

Nor should this Court remain silent in the face of an impeding tragedy. This Court may well be the last hope of a little baby and the adoptive parents whose only crime was to take in an unwanted child, love her, cherish her, and give her something that her birth parents never offered at the time — a home.

The Facts

This is an adoption proceeding involving an infant, known as Raquel Marie, who was born on May 26, 1988 (Tr. A17).[1] The child was born to Louise N. (Tr. A17) who was then 23 years old. (Tr. B760). Louise N. graduated from high school and intended to have a career as a dental technician (Tr. B760, 762).

The biological father of Raquel Marie is Miguel T. (Tr. A17). He was a mason construction laborer who claims to have earned some $4,000 in 1988, including $500 earned "off the books" working for his brother. (Tr. B 124). As of the time of the child's birth in May, 1988 and for the preceding year, the natural parents had

[1] References to "Tr. A" are to pages in the transcript for April 28, 1989. References to "Tr. B" are to pages in the transcript for May 1, 1989 and all ensuing trial days.

not lived together, except for one week. Indeed, the natural mother had secured *three* orders of protection from the criminal courts against Mr. T., as a result of his assaultive behavior.

Raquel Marie was surrendered by Ms. N. to the adoptive parents, Petitioners Robert and Ana C., on July 22, 1988. (Tr. A17). Mr. and Mrs. C. reside in Nashua, New Hampshire (Adoption Petition, verified January 6, 1989, Par. 1,3). Mrs. C. is a clinical social worker who earns $22,000 per year (*Id.*, Par. 2); Mr. C. is the president of his own business and earns $115,000 per year (*Id*, Par. 3).

On July 22, 1988, Ms. N. executed documents manifesting her intention and desire to consent to the adoption of Raquel Marie by Mr. and Mrs. C. (Petition, Par. 12 and Ex. B thereto). In the executed papers, Ms. N. acknowledged that she was placing the child for adoption because she recognized that she could not provide a good home for the baby and that the adoptive parents would provide "a fine home with a stable family environment which is something I could not provide a child at this time". (Petition, Ex. B). Raquel has continuously resided with Mr. and Mrs. C. since July 22, 1988.

In November 1988, Miguel T. and Louise N. reconciled and married each other. They then opposed the adoption petition filed by Mr. and Mrs. C. It should be noted, however, that shortly before the Court of Appeals' decision, Ms. N. separated from Mr. T. and filed proceedings against him, claiming that he had assaulted her on two occasions during the pendency of proceedings in the Court of Appeals.

Miguel T. and Louise N. met while they were high school students. (Tr. B4). They developed a sexual relationship (Tr. B5) and a child, Lauren, was born to them on August 10, 1986. (Tr. B15-16). Mr. T. claimed that, at this time, he and Ms. N. were living together "part time" at the home of Mr. T.'s parents. (Tr. B8). They discussed marriage; they each made marriage proposals to the other which were rebuffed. (Tr. B14, B247).

In September or October, 1986, Mr. T. and Ms. N. discussed sharing an apartment but never moved in together (Tr. B16, B17).

They were already in court on visitation and support disputes and by April 1987, Mr. T. was in default under a support order for Lauren. (Tr. B259-260).

In April 1987, Mr. T. and Ms. N. moved to an apartment together. (Tr. B18-19). However, that period of joint occupancy was short-lived. In May, 1987, Louise discovered that Miguel had been "cheating" with the next door neighbor; she argued with that neighbor and the neighbor's father; and the neighbor's father threatened to press criminal charges unless the parties moved out. (Tr. B20). In July of 1987, Louise left the apartment first and Mr. T. left the week after. (Tr. B21). This was the *only* period of time the parties lived together, during the five years they had known each other, with the exception of the one week which followed the birth of Raquel Marie.

In June or July 1987, Ms. N. become pregnant again. (Tr. B149). She, without telling Miguel, went to a doctor and had an abortion. (Tr. B149). This conduct angered him (Tr. B150). And he struck back.

On July 19, 1987, Appellant, who was living with his parents in Eastchester, went to Louise's parents home in Tuckahoe in the afternoon. (Tr. B157). When Ms. N. asked him to leave, he followed her into the house, demanded to talk to her, and then punched her in her left eye. (Tr. B158). She was hit so hard that she sustained a gash, was brought to the hospital emergency room, and was sutured. (Tr. B158). She received some three stitches. (Tr. B677). As a result of this incident, criminal charges were filed against Mr. T. and a court order of protection was issued to Ms. N. (Tr. B159).

Louise became pregnant again in September, 1987. (Tr. B556, 571-572). She told Fran McLaughlin, a member of the Westchester County District Attorney's Domestic Violence Unit, that she, (Ms. N.), had been raped by Mr. T. and that the pregnancy had resulted from this rape. (Tr. B688-689). She made the same statement to an Assistant District Attorney (B891), to a caseworker at Spence Chapin Agency (Ex. 14) and to her therapist (Ex. K). At trial, Ms. N. conceded that she had believed there was a relationship between the abortion in July 1987 and

the circumstances of her pregnancy in September 1987 ("it had something to do with what I had done previously") (Tr. B888), that prior conduct being an abortion (Tr. B890). Therapy records document the following (in July 1988): "Louise claims that her most recent pregnancy (Raquel) was the result of Michael forcing himself on her in retaliation for the abortion". The same records also reflect that Mr. T., according to Louise, "has used and dealt cocaine and that he smokes pot". The therapist noted that Louise believes that Mr. T. "has been with other women" and that, while he promises help with babies, he "flees" and does not pay attention to them. (Ex. K).

In addition, in June, 1988, Louise told Dee Dee Bouscaren of the Spence-Chapin Agency that Mr. T. had been "unreliable"; "physically and verbally abusive"; and has "made it known that he continues to be involved in other relationships". (Ex.14). In July, 1988, Louise told Ms. Bouscaren that, when she and Miguel were living together (i.e., in May, 1987) Miguel had been "unfaithful to her" and had "actually gave her pubic lice". (Ex. 14).

On Halloween 1987, Mr. T. pushed Ms. N. in the face while they were in a restaurant parking lot. (Tr. B706-707). She was angry at him because she wanted "to spend more time" with Mr. T. (Tr. B708). She recalled that she also assaulted him; that the incident was reported to the police; and that her lip was swollen. (Tr. B708).

On November 4, 1987, Mr. T. came to the home of Ms. N.'s parents (Tr. B630). At first, Mr. T. remained in his car outside beeping the horn. (Tr. B631). Later in the day, he returned and knocked on the door. He wanted to talk to Louise and he "just got upset" because she did not want to speak with him (Tr. B632). Ms. N. told the police in a written statement (Ex. I) that Miguel T. kicked in the front door and threatened harm to her if she brought "any other men into the house", and left. Ms. N. again filed criminal charges.

On January 19, 1988, Mr. T. again entered the home of Ms. N's parents, grabbed Ms. N. and left a mark on her neck. (Tr. B662-663). He did this in reaction to Ms. N.'s blaming him for

being with another woman. (Tr. B664). Ms. N. tried to call the police, but Miguel prevented her from doing so by grabbing the telephone from her hands. (Tr. B666). He then took the telephone and hit it into the wall. (Tr. B667-668).

On March 1, 1988, Mr. T. pled guilty to assault in the third degree and criminal mischief in the fourth degree in satisfaction of the six pending criminal charges brought against him by Ms. N. (Tr. B191-196; Ex. B). He was sentenced to three year's probation and to pay restitution. In addition, the Court granted Ms. N. a permanent order of protection.[2]

In March, 1988, Ms. N. and Lauren moved to an apartment in Mount Vernon, New York. (Tr. B557). She located this basement apartment through a real estate agent, without assistance from Mr. T. (Tr. B558-561). She paid the rent, security deposit, and broker's commissions from her own funds and with public assistance benefits. (Tr. B558-565).

Ms. N. did want Mr. T. to participate in any LaMaze classes with respect to Raquel's pregnancy (Tr. B293); his name did not appear on the birth certificate (Tr. B293); and his name nowhere appears in the voluminous hospital records. (Tr. B294-295).

After the birth of Raquel Marie, Ms. N. returned to her apartment. (Tr. B70). Raquel was retained in the hospital for a few extra days and, thereafter, she was brought to the apartment. (Tr. B70). Miguel T. contended that he lived at the apartment for "about one week" shortly after Louise returned home with the baby. (Tr. B85). However, during that week, they were arguing and Mr. T. believed that "it wasn't safe for me to stay there at night" (Tr. B85).

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[2] These charges and convictions were not Miguel T.'s only contacts with the criminal courts. In addition to the criminal proceedings brought by Louise, there were the following: a theft of items from a drug store in September 1986 (Tr. B255); a charge of loitering at Eastchester High School in January, 1984, in which Mr. T. received an "ACD" disposition (adjourned in contemplation of dismissal) by *misrepresenting* his lack of prior arrests and convictions (Tr. B354-359); a July, 1983 conviction for trespassing at Leewood Country Club (the arrest was for burglary) (Tr. B 357-358); and then pending charges involving an assault on his brother's girlfriend. (Tr. B344-349).

On June 9, 1988, Miguel T. visited Ms. N. at her apartment; complained to her that she looked like "a slut and a whore"; that her clothes were "bimbo" clothes; and proceeded to pull her clothes off. (Tr. B205-206).

Later in June, 1988, Raquel was turned over to the Spence-Chapin Agency (Tr. B88). Ms. N. did this so that she could get a "break" (Tr. B99). She found it "hard" to deal with both children (B714), difficulty not assisted by the fact, as Miguel T. conceded, that there "were times where I wasn't there" (Br. Tr. B90). Louise did not want to allow him to take the baby to his parents because she was "insecure" and "was scared some other girl would take care of my baby" (Tr. B719). Moreover, she feared leaving Raquel with Mr. T. because of his "dogs". (Tr. B376).

The placement with Spence-Chapin occurred on June 23, 1988. (Tr. B305). However, prior to placement, Ms. N. decided to give Miguel T. another chance. On June 20, 1988, Louise came to his residence, dropped the children at the door, spit at Miguel, and told him to look after the children. (Tr. B386). Though Louise had no custody order, Miguel did not keep the children. His only concern was that Louise had an order of protection and he did not "want to get in any more trouble that [sic] he was already in." (Tr. B387-388). All of this occurred at a time when Miguel knew Raquel might be given up for adoption and Miguel was considering his avenues of legal redress. (Tr. B388).

Louise later testified that this incident was a test – one which Mr. T. failed. She dropped the children off that day because "if he wanted all the responsibility, then for him to take it". (Tr. B745). Ultimately, she retrieved the children, with the help of her mother (Tr. B745). Just three days later, she placed the child with Spence-Chapin.

Raquel Marie remained at Spence-Chapin for some 20 days. (Tr. B 305). Louise had advised Miguel that she was considering placing Raquel in foster care; he made no objection. (Tr. B304, 305). At no point during the 20 day stay of Raquel at Spence-Chapin did Miguel visit her or file any petition in any court as to her custody. (Tr. B306-307).

In July 1988, Louise went to the Spence Chapin Agency for an unannounced visit with Raquel. When the child could not be immediately produced, she formulated a desire to obtain the baby back. When the caseworker attempted to counsel her, she summoned Mr. T. Eventually, Raquel was relinquished to Ms. N.

Though Mr. T. contended that Ms. N. had frequently discussed a possible adoption for Raquel and that he told her that he would oppose it (Tr. B86-100), he claimed that there was "nothing" he could do until after the baby was born. (B99). Mr. T. and his attorney were aware of Ms. N.'s plans for adoption as early as January of 1988, five months prior to the child's birth (Exhibit 13 at p.5).

Mr. T. claimed to have been advised on July 12, 1988, by Louise that she just had a conversation with Ana C. concerning an adoption. (B429). His response was to walk out of the house. (Tr. B379). Even after learning that Louise was talking to specific people about an adoption, he did nothing for yet another week. (B429-432).

On July 19, 1988, Mr. T. filed a custody petition in Family Court - seeking custody of both Raquel and Lauren. (B101). However, he admittedly knew, as early as January, 1988, that Louise was considering adoption. (Tr. B96, B286). Notwithstanding that he knew Louise was considering adoption, notwithstanding that he knew of the Spence-Chapin placement in advance, he contended that he "was always kept in the dark" about adoption. (Tr. B303). But be that as it may, the baby was born on May 26, 1988, and he did nothing for two months (Tr. B380), even though he was well aware of Louise's plans to place the child for adoption. (Tr. B381).

The petition Miguel T. filed in Family Court on July 19, 1988 was a custody petition (B101), which made no reference to any adoption. Instead, his petition alleged that Louise was not "ABLE TO CARE FOR THE CHILDREN WHILE SHE IS WORKING OR IN SCHOOL." Ironically, Mr. T. claimed, in his petition, that he "CAN PROVIDE A STABLE HOME ENVIRONMENT.". (Petition of July 19, 1988). On July 22, 1988,

Louise executed the documents in reference to this adoption proceeding and delivered Raquel to petitioners.

Thereafter, Miguel and Louise received counseling from the Family Consultation Services. (B Tr.122-125). An order declaring Miguel T. to be the father of the child was made in August, 1989, in proceedings held without notice to petitioners. (A-35).

As late as October 1, 1988, there were still major incidents of violence between the parties, including an incident where Mr. T. pulled out clumps of Ms. N.'s hair (Tr. B213-214). The Eastchester Consultation Services records for this same period reflect that Louise believed that her decision to place Raquel for adoption was the "only way she could make a good life for herself and Lauren"; that Louise was "very needy" of therapy services; that Louise was abused by her father; and that the therapy was abruptly terminated. The Spence-Chapin case worker likewise reported that Louise was " in crisis", was overwhelmed by the prospect of raising two children alone and was frightened by Mr. T.

In September, 1988, Mr. T. brought a habeas corpus petition in Supreme Court, Westchester County in an effort to obtain custody of Raquel. (B433). At this late date, Ms. N. made no attempt to reclaim the child or to assist Mr. T. in his efforts. Indeed, he alleged that she had abandoned the child. Moreover, there was some evidence indicating that during this time Mr. T. obtained counselling for his propensity for violence at the Westchester Jewish Community Center. (B338). However, Mr. T. conceded that, despite this therapy, there were further incidents of violence. (Tr. B389).

Mr. T conceded that his marriage to Ms. N. was motivated at least in part by a desire to "help each other and get our child back" and to "start our lives as a family unit." (B414). Significantly, Mr. T. admitted that prior to November 1988, his family "wasn't an intact family". (Tr. B438).

It is undisputed that from July 22, 1988 to the time of the marriage in November, 1988, Ms. N. herself believed that the adoption was in Raquel's best interest and refused, despite several

opportunities and pressure, to join Mr. T. in opposing the adoption. Indeed, she told Spence-Chapin that she was "frightened with the prospect of raising two children on her own, and she is frightened by the BF [birth father] who is violent." (Ex. 14). Since Ms. N. did not desire the return of the child, this might result in turning over her child to Mr. T. — who, at that point in time had never been adjudicated her father; his only adjudications were as a criminal and as assaulter of women.

REASONS WHY WRIT SHOULD BE GRANTED

Specific Legal Issues to be Addressed

1. Based on its misperception of the prior decisions of this Court, the New York Court of Appeals has held that the State, as a condition for granting unwed fathers the right to veto an adoption, may not constitutionally insist that the father have participated in the formation of any sort of unitary or enduring family unit. Rather, it held that a liberty interest is to be recognized from the very existence of the biological connection by itself, even if that connection is never developed into any substantial, positive relationship with either the mother or the child. Moreover, the Court of Appeals held that the liberty interest of the father springs into being with the birth of the child and is to be viewed in isolation from the father's relationship with the mother. These views are in direct conflict with the prior precedents of this Court, and, in particular with the opinions of Justices Scalia and Stevens in *Michael H. v. Gerald D.*, ____ U.S. ____, 109 S.Ct. 2333 (1989). Even Justice Brennan, dissenting in *Michael H.*, agreed that a constitutionally protected liberty interest only when the father has developed "a substantial parent-child relationship". 109 S.Ct. at 2352.

2. The Justices of this Court in the separate opinions filed in *Michael H. v. Gerald D.* reflected profound disagreement as to the breadth of this Court's prior precedents governing the nature of the liberty interest that may be asserted by nonmarital fathers. While *Michael H.* was not an adoption case, the division of the Court as to the proper construction of its prior precedents has caused state courts, and legislatures, to disagree

as to appropriate standards for measuring the rights of unwed fathers in the adoption context. At root are fundamental policy questions. Here, the Appellate Division, implicitly following the approach taken by Justice Scalia's plurality opinion, upheld the statute as providing proper criteria for measuring the presence of a protected family relationship. The Court of Appeals read the very same cases to mean that the unwed father has an liberty interest, flowing from the biological connection, which is independent from any familial relationship. This Court has a responsibility to resolve these fundamental differences, particularly since, without further clarification, state courts and legislatures will be left adrift on an uncharted sea.

3. The present case, unlike any previously considered by this Court, involves a statute specifically designed to deal with consent rights of unwed fathers to the adoption of newborn infants — those placed for adoption when less than six months of age. In *Caban v. Mohammed*, 441 U.S. 380 (1979), this Court specifically left open whether the special difficulties attendant to newborns would permit the State to impose more stringent requirements upon unwed fathers seeking automatic veto rights. The Court of Appeals below has construed this Court's prior precedents as requiring that unwed fathers be afforded an opportunity to develop a relationship with the child, even if the mother, for valid reasons, wishes to place the child for adoption at, or shortly after, birth. The result of the holding below will be to encourage unwed mothers, burdened by brutal relationships with men, to abort pregnancies. The conferral of a broad veto power, unchecked by any consideration for the best interests of the child, upon unwed fathers creates a powerful weapon for causing further injury to victimized women. An unwed mother considering adoption or abortion is not likely to choose adoption if those plans can be easily disrupted by a father who has made no commitment to the mother during pregnancy. She is not likely, in short, to choose adoption if conflict with an unwanted (and violent) man is the price to be paid for choosing life for the baby.

4. Respondent Miguel T., pursuant to Section 111-a of the Domestic Relations Law, was notified of this adoption and has

been afforded the opportunity to participate in the proceedings. Specifically, he has participated in a evidentiary hearing concerning, among other things, whether the adoption of Raquel Marie would be in her best interests. That hearing commenced after the Appellate Division's order of September 11, 1989 and was suspended without date upon the decision of the Court of Appeals to take jurisdiction of the case. The Court of Appeals determined that, in all instances where an unwed father manifests sufficient interest in the child, the unwed father may insist upon an absolute veto right. Such an absolute right exalts the rights of the unwed father over the rights of the child. This Court has never held that an absolute right must always be conferred upon an unwed father once he is found to have a liberty interest in the child. Indeed, Justice Stevens, in his separate opinion in *Michael H.*, expressed the view that the constitutional rights of unwed fathers may be sufficiently respected by a statutory scheme which affords him the opportunity to make a plea based upon the child's best interests. That New York unquestionably does.

ARGUMENT

POINT I

THE COHABITATION REQUIREMENT OF DOMESTIC RELATIONS LAW SECTION 111 IS CONSTITUTIONAL

Domestic Relations Law §111 (subd. 1 [e]) was enacted in order to address the concerns of this Court in *Caban v. Mohammed*, 441 U.S. 380 (1979). In drafting the statute, the Legislature drew meaning, not only from *Caban*, but from *Matter of Malpica Orsini*, 36 N.Y.2d 568, 577, 370 N.Y.S.2d 511, 520 (1975), *appeal dismissed*, 423 U.S. 1042 (1977), decided a few years before. Mr. Caban was found to have a liberty interest sufficient to entitle him to veto the proposed adoption where he had been identified as the father on the children's birth certificate, had actually lived with the children for *over five years*, and had paid support. For all intents and purposes, there was an intact family unit which would have been disrupted by the adoption.

In contrast to the facts presented in *Caban*, this Court found no constitutional impediment to denying an automatic veto to the unwed father in *Malpica Orsini*, who, though he lived with the mother for nearly two years, was seriously in default in support payments, was given to "violent rages", tore a telephone off the wall on two occasions, ripped the wires out of the mother's car and threatened to take the child and disappear.

The distinction drawn in §111 (1) between children placed for adoption, before or after, six months of age was directly drawn from the decision in *Malpica Orsini*. There, as this Court noted in *Caban*, it was recognized that, where young infants are involved, it is often impossible to locate unwed fathers, whereas mothers are more likely to remain with their children. 441 U.S. at 392. In *Caban*, the Court responded to this suggestion by commenting that the "special difficulties attendant upon locating and identifying unwed fathers at birth" could justify a legislative distinction between mothers and fathers of newborns. *Id.* Manifestly, a father who has resided with the pregnant mother is similarly situated with the mother: both are readily found, both are likely to remain with their children. An unwed father who resides with the pregnant mother is similarly situated to a wedded father: both are readily found, both are likely to remain with their children.

The enactment of §111 (1) (e) not only accommodated the constitutional rights of unwed fathers but also promoted adoption and protected the rights of adoptive children and adoptive families to have their futures decided expeditiously and finally. See *New York State Council on Children and Families* statement in support of S-9768 at 2 (June 25, 1980); *New York State Department of Social Services* statement in support of S-9768 at 2 (June 20, 1980); *Legal Aid Society* statement in support of S-9768 at 2 (July 2, 1980).

> This bill establishes a uniform standard which will aid the Court, social service districts and authorized agencies in determining whether consent from the father is required prior to the adoption of a child born out of wedlock. This, in turn, should both promote

> consideration of adoption by prospective adoptive families, and help assure stability of the adoptive home when an adoption does occur. *New York State Department of Social Services* statement in support of S-9768 at 2 (June 20, 1980).

Absent enforcement of the objective criteria adopted by statute, the confusion generated by *Caban* will be revived. Natural mothers, adoptive parents, and adoption agencies will be left with uncertainty as to how individual judges would respond to individual cases if the statute is regarded as merely a flexible measuring point, malleable with each judge depending upon the particular circumstances of each case and the particular viewpoints of each judge. That is exactly what the Legislature sought to avoid. The statute provides readily ascertainable standards, necessary so that the parties can structure their lives.

A firm standard is needed to protect the natural mother and adoptive parents, as well as the child, from the uncertainties inherent in a flexible, unpredictable standard. Indeed, since many children under six months old are placed for adoption at, or shortly after, birth, it is impossible to wait and see if the unwed father elects to pursue a substantial, positive relationship with the child. In order to do so, the unwed mother would be saddled, as here, with a child that she could not properly care for, which she could not financially support, and which she did not want.

As was explained in *Matter of Robin U.*, 106 Misc.2d 828, 435 N.Y.S.2d 659, 662 (Family Ct. Orange County 1981):

> "there are pragmatic differences between the relationship of an unwed father with a newborn or very young child and the relationship of an unwed father with an older child. The unwed father of a newborn or very young child does not have the opportunity to establish an ongoing relationship with the child through substantial and continuous or repeated contact so that the quality of his relationship with the child's mother, his public acknowledgment of his fatherhood and his

> acceptance of financial responsibility for the newborn child's birth must be used as indicia of his parental concern."

Where a child is placed after six months of age, both parents will have had an opportunity to establish a home, or at least meaningful contact, with the child. As to a unborn child, placed shortly after birth, it is obviously impossible, as *Robin U.* notes, for the father to maintain contact with the unborn. The way he establishes his connection is by maintaining a positive relationship with the mother. Indeed, as Justice Scalia made explicit in *Michael H.*, the presence of constitutional rights is dependent upon the presence of an family relationship. The New York courts have consistently viewed §111 (subd. 1 [e]) as a test for what Justice Scalia refers to as "a protected family unit" (109 S.Ct. at 2342) or what Justice Stevens terms "an enduring 'family' relationship" (109 S.Ct. at 2347).

For example, in *Matter of Female D.*, 83 A.D.2d 933, 442 N.Y.S.2d 575 (2nd Dept. 1981), the Court stated that the consent of a non-marital father of a child born out-of-wedlock is not required:

> where the father has failed to satisfy such legislatively prescribed criteria as are intended to demonstrate that the newborn infant has a functioning male parent (and, therefore, a *de facto* family) available to him or her. Thus, where the unwed father is available to the child through his presence and his financial support (see Domestic Relations Law, §111, subd. 1, par. [e]), the father is afforded a voice regarding the adoption of the infant and his consent is required. Where, however, the unmarried father does not meet these criteria, the adoption may go forward merely upon the consent of the mother. 442 N.Y.S.2d at 578.

Female D. rejected the view that the statute was unconstitutional. The Court stated that "the foregoing statutory scheme effectively promotes the adoption of illegitimate newborns into

stable adoptive families. The statute requires the consent of *both* parents where a *de facto* family unit has been created through the efforts of the natural father but, at the same time, precludes an absentee biological father from frustrating the attempts at adoption undertaken by the natural mother in the perceived best interests of the child where she is the only parent available to it." 442 N.Y.S.2d at 578.

The Court of Appeals below misread the five major precedents of this Court. Indeed, it is clear that this Court has never detected a liberty interest in the circumstance presented here — an unwed father who was not part of a viable, unitary, intact family.

Thus, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the unwed father lived with the mother and children and supported them for 18 years. By having participated in raising the children for such a lengthy period, the unwed father developed a powerful interest in those children, meriting constitutional protection. As Justice Scalia wrote in *Michael H.*, *Stanley* rests upon the "historic respect — indeed sanctity would not be too strong a term — traditionally accorded to relationships that develop within the unitary family". 109 S.Ct. at 2342.

The second major pronouncement of this Court came in *Quilloin v. Walcott*, 434 U.S. 246 (1978) where no rights were found because the unwed father never established a home with the unwed mother and never had custody of the child. Notably, in *Quilloin*, this Court emphasized that the unwed father had been afforded notice of the adoption and had been afforded an individualized hearing as to his interests in the child, including the opportunity to offer best interests evidence. 434 U.S. at 253-254.

Quite strangely, the Court of Appeals below detected in *Quilloin* the notion that the rights of unwed fathers are to be afforded lesser protection where a stepfather has shouldered the parental role left open by the biological father — a factor the Court of Appeals said would not apply where the adoptive parents are "strangers to the children". (A-12). Such a holding is untenable. Why should the rights of the unwed father turn

on whether the mother has invited another man to supplant the unwed father in her life, as distinguished from her surrendering the child outright? Indeed, the Court of Appeals inconsistently held that it is improper to focus upon the father/mother relationship. Moreover, an approach based on whether a stepparent seeks adoption was, expressly rejected in *Lehr v. Robertson*, 463 U.S. 248. (1983). There this Court explicitly stated, in footnote 19, that, while *Lehr*, like *Quilloin*, happened to involve an adoption by the husband of the natural mother, there was no reason to believe the natural father has any greater right to object to such an adoption than to an adoption by two total strangers.

Moreover, the fact remains that Miguel T. had left open the parental role; that was precisely why Louise N., after affording Miguel T. ample opportunity, elected to proceed with adoption. It is utterly offensive to term Robert and Ana C. "strangers" to Raquel Marie; if anyone is a stranger to her, it is Miguel T. During the two months of her life that passed prior to placement, Miguel was so uninvolved as to be the motivating factor in Louise's decision to pursue adoption. It was Robert and Ana C. who shouldered the parental role left open by both biological parents. Indeed, by the time of the filing of the adoption petition in January 1989, Miguel's writ of habeas corpus had been dismissed and Raquel Marie had been living with Mr. and Mrs. C. for over half a year. As in *Quilloin*, the purpose behind the unwed father's objection to adoption was to frustrate an effort to "give full recognition to a family unit already in existence". 434 U.S. at 255-256. In *Quilloin*, the natural father, despite many visits to the child, gifts to the child, and legally obligated support to the child, was denied a right to object to adoption because of his failure to offer the child a committed relationship paralleling the stability and security of the family unit, circumstances very much like those present herein.

The third major precedent, *Caban v. Mohammed*, 441 U.S. 380, *supra*, likewise involved a situation where the unwed father lived with the unwed mother and the children for a substantial period of time (more than five years) and supported them. *Caban* held that it is an impermissible gender-based discrimination to deny unwed fathers the right to veto an adoption where

they have established a parental relationship as substantial as that of the unwed mother. 441 U.S. at 386-387. In the case of newborns, it is a biological fact that the father cannot have the same level of commitment to the fetus as the mother. It is, after all, the mother who carries the child. For the father to establish a relationship with the fetus, he must have a commitment to the mother. By living with the mother, the father lives with the fetus.

The Court of Appeals below also drew upon this Court's decision in *Lehr v. Robertson*, 463 U.S. 248 (1983), which upheld, as against constitutional challenge the notice provisions of New York Domestic Relations Law, §111-a. However, there this Court, expressly reinforcing the notion that it is the family unit which must be the focus, rejected a claim by the unwed father that it was unconstitutional to deny him notice where he was not listed on the birth certificate, did not live with mother or child after birth, and did not provide support.

Notably, this Court in *Lehr* commented on the viability of the entire New York statutory program: citing to both §111 (as to veto rights) and §111-a (as to notice). This Court had little difficulty concluding that New York's procedures were constitutional, as designed to promote the best interests of the child, protect the rights of interested third parties, and ensure promptness and finality. It is strange, indeed, that a decision of this Court upholding one part of a unitary statutory scheme should be read as supporting the invalidation of another part of that same scheme.

Just as mangled by the Court of Appeals was the determination in *Michael H. v. Gerald D.*, U.S. , 109 S.Ct. 2333 (1989). There, it was determined that a biological father had no constitutional right to seek a declaration of paternity as to a child born to the wife of another man. Yet, if one read only the opinion of the Court of Appeals below, one would conclude that the biological father had prevailed in this Court, when he had not. Ignored completely was Justice Scalia's analysis of the precedents — an analysis in keeping with the statutory concept at issue here. Justice Scalia wrote that whether the father of an out-of-wedlock child has constitutionally protected interest in that child

depends upon whether the father has had such a relationship with the mother as to give rise to "a protected family unit under the historic practices of our society". 109 S.Ct. at 2342. The father was denied any right to claim paternity, though he lived with the mother during a three-month period and stayed over with the mother and the child periodically during an eight month period.

Justice Scalia rejected the notion that biological fatherhood plus an established paternal relationship yields constitutional rights, 109 S.Ct. at 2342, an equation that Miguel T. seeks to sustain here. Rather, as Justice Scalia put it, the rationale of the Court's prior caselaw is based on the historic respect "traditionally accorded to the relationships that develop within the unitary family". *Id.* As a result, the issue is "whether the relationship between persons in the situation of [Miguel] and [Louise] has been treated as a protected family unit under the historic practices of our society. . . ." *Id.*[3]

Justice Scalia's analysis was concurred in by three other Justices. Justice Stevens, in his separate concurrence, agreed that the key is the presence of "enduring 'family' relationships". Moreover, Justice Stevens concluded that, at best, the unwed father's rights were limited to participation in a best interests hearing on visitation. 109 S.Ct. at 2347.

Manifestly, the evidence shows affirmatively that Mr. T. and Ms. N. had not formed any "unitary" family whose relationships are entitled to historic respect: not in light of the evidence that the parties would not live together, would not marry each other, were violent toward each other, had romantic relationships with others, and spent much of their time litigating various court criminal and civil proceedings. Mr. T. testified that, as

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[3] This statement rejects the claim of Appellant that his rights cannot be measured by his relationship with Ms. N. Indeed, in a statement remarkably applicable here, Justice Scalia rejected the claim that the father's rights are determined only by the relationship to the child since, to do so, could lead to the conclusion that a rapist could gain paternal rights. 109 S.Ct. at 2342 n.4.

of November 1988 (a period five months after the child's birth and three months after the child's placement for adoption), there was no "intact" family. (B438).

The requirements of §111 (1) (e) were carefully drawn to promote compelling state interests.

First, the State has a clear responsibility in facilitating and expediting adoptions of out of wedlock children. Second, the State has legitimate concerns in promoting prenatal care of infants and their mothers. Third, the State, as *parens patriae*, has an interest in the well being of adoptive children and their prospective adoptive families. The State has an interest in preventing "a wide range of prospective placements and adoptions" from being discouraged because prospective adoptive parents would fear being drawn into "an excursion into relative values difficult of proof". *Matter of Malpica Orsini, supra*, 36 N.Y.2d at 576, 370 N.Y.S.2d at 519. The Legislature has an valid interest in enacting statutes which will prevent "controversy and uncertainty" from overhanging adoptions. *Matter of Sarah K.*, 66 N.Y.2d 223, 242, 496 N.Y.S.2d 384, 394 (1985) (Kaye, J.), *cert. denied*, 475 U.S. 1108 (1985).

Most important, the State has a compelling interest in preserving the integrity of a woman's fundamental right to choose whether or not to bear a child. *In re Baby Girl S.*, 628 S.W.2d 261, 264 (Tex. Ct. of Cir. App. 1982). Under *Roe v. Wade*, 410 U.S. 113 (1973), a woman has the right to decide whether or not to go through with her pregnancy. That right may not be abrogated by the father of the child. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In order to make a clear-headed decision about pregnancy, it is essential that the threat of future contravention of her decision to place the child for adoption (instead of aborting the fetus) not loom over her head.

The President's Task Force on Adoption has reported that abortion is the principal barrier to adoption, with teenage mothers involved in nearly one-third of the over 1.5 million abortions in 1982. While adoption is clearly an alternative to abortion, that choice is not viable where the possibility looms that

a father may fit within uncertain, fluid criteria and thereby unexpectedly upset the mother's well-considered plan by withholding consent. While adoption may be a positive solution that meets the needs of the parties, the result may be the coerced abortion by the mother to avoid a problematic situation created by uncertainty as to the father's "rights". An unwed mother considering adoption or abortion is not likely to choose adoption if conflict with the father is the price she may pay for choosing life for the baby.

To grant an unwed father a veto power over adoption, in the absence of a demonstrated commitment to the mother and child would unnecessarily delay, complicate and impede the adoption process. Unwed mothers would choose less desirable alternatives in order to avoid or circumvent the adoption system; they would settle for premature or undesired parenting; more babies would be aborted, placed in indefinite foster care, or illegally marketed. The social costs and personal tragedy would increase.

§111 (1) (e) protects against legitimate risks — it prevents complication of the adoption process, threatens to the privacy interests of unwed mothers, the creation of unnecessary controversy and litigation, the unnecessary delay of adoptions, and impairing the finality of adoption decrees. As this Court has noted, many unwed fathers withhold adoption consent solely to harass the mother, by forcing her to keep the baby against her will or to maintain contact and coerce marriage with the mother*, and that mothers, faced with uncertainty regarding the finality of adoption or with the possibility that the father may obtain custody, will simply keep their babies. *Caban v. Mohammed*, 441 U.S. 380, 407 n. 13 (1979). To classify a biological father as a parent entitled to veto an adoption, merely by taking vague steps gives him a "powerful club" to substantially reduce the options open to the mother. *In the Interest of T.E.T.*, 603 S.W. 2d 793, 797 (Texas 1980).

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* This threat may have come to pass herein. The evidence adduced below suggests that pressure was, indeed, put on Ms. N. It is not entirely coincidental that the marriage came only after Miguel T. was defeated in his attempt to obtain custody on his own.

There are powerful policy reasons supporting the New York Legislature's decision to provide "a reasonable, unambiguous and objective standard". See 1980 N.Y. Leg. Annual, pp. 242-243. It had every right — and every obligation — to do so. The New York Court of Appeals should not have invoked the federal constitution to defeat the salutary purpose of the legislation.

POINT II

EVEN ASSUMING *ARGUENDO* THAT MIGUEL T. HAS ANY LIBERTY INTEREST, THAT INTEREST WAS FULLY PROTECTED BY GIVING HIM NOTICE OF THE PROCEEDING AND THE OPPORTUNITY TO PARTICIPATE AT THE BEST INTERESTS HEARING

Pursuant to Dom. Rel. L. §111-a, Miguel T. was afforded notice of the adoption proceeding and the opportunity to be heard on the issue of best interests. In fact, Appellant, through his counsel, has fully participated in every day of the hearing that had commenced following remand by the Appellate Division.

Even assuming *arguendo* that Miguel T. has shown sufficient indicia of interest in the child to be entitled to some constitutional protection, that should not mean that he was thereby entitled to a declaration that the entire statutory scheme is unconstitutional and that he may veto the adoption. As Justice Stevens suggested in his concurring opinion in *Michael H.*, *supra*, the constitutional right may be limited to the right to try to convince the trial court that blocking the adoption would be in the child's best interests. See 109 S.Ct. at 2347; see also *Quilloin v. Walcott*, 434 U.S. 246 (1978). Indisputably, New York law affords him that opportunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: White Plains, New York
October 8, 1990

Respectfully submitted,

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APPENDIX

Remittur

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

2 No. 133

In the Matter of Raquel Marie X.
(Anonymous)

Mr. and Mrs. C. (Anonymous),
Respondents,

Mr. T. (Anonymous),
Appellant,

Mrs. T. (Anonymous),
Respondent.

The appellant(s) in the above entitled appeal appeared by Domenick J. Porco, Esq.; *the respondent(s) appeared by* Fink Weinberger Fredman Berman Lowell & Fensterheim, P.C., Alan D. Scheinkman, Esq., and Richard S. Birnbaum, Esq.; and law guardian appeared by Richard J. Strassfield, Esq.

The Court, after due deliberation, orders and adjudges that the order is reversed with costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Second Department, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Donald M. Sheraw

Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 10, 1990

State of New York
Court of Appeals

2 No. 133

In the Matter of Raquel Marie X. (Anonymous).

Mr. and Mrs. C. (Anonymous),
Respondents,

Mr. T. (Anonymous),
Appellant,

Mrs. T. (Anonymous),
Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

1 No. 134

In the Matter of Baby Girl S.

Adoptive Parents,
Appellants,

v.

Natural Father et al.,
Respondents.

(133) Domenick J. Porco, Scarsdale, for appellant.
Richard S. Birnbaum, White Plains, for respondent Mrs. T.
Alan D. Scheinkman, Ronald J. Bavero, White Plains, for respondents Mr. and Mrs. C.
Richard J. Strassfield, Eastchester, law guardian.

(134) Alan D. Scheinkman, White Plains, for appellants.
George A. Terzian, Mary A. Clarke, NY City, for respondent mother.
Joseph T. Gatti, NY City, for respondent father.
Kevin C. Fogarty, Neponsit, law guardian.

KAYE, J:

The focus of these appeals, involving the adoption of newborn infants, is Domestic Relations Law § 111(1), which provides that — while an unwed mother's consent is always required — an unwed father's consent to the adoption of his under-six-month-old child is required only where he has openly lived with the child or the mother for six continuous months immediately preceding the child's placement for adoption, openly

acknowledged his paternity during such period, and paid reasonable pregnancy and birth expenses in accordance with his means (Domestic Relations Law § 111[1][e]). We conclude that the statutory requirement that the father openly live *with the mother* before the child's placement for adoption neither legitimately furthers the State's interest nor sufficiently protects that father's, and that 111(1)(e) must therefore be declared unconstitutional.

While the facts in both cases have been developed at length elsewhere (*see, Matter of Raquel Marie X.*, 150 AD2d 23; *Matter of Baby Girl S., published in part at* 141 Misc 2d 905, *affd without opn* 150 AD2d 993), only a few are pertinent to the present analysis.

Both cases are adoption proceedings involving out-of-wedlock children whose birth mothers executed consents to their adoption. The putative adoptive parents were strangers to the children. In each case the child is a girl now just two years old—Baby Girl S. was born on April 24, 1988, Raquel Marie on May 26, 1988. Baby Girl S. was placed for adoption by her mother on April 27, 1988, two days after her birth; Raquel Marie on July 22, 1988, two months after her birth. In each case, the biological parents did not live together for any sustained period of time prior to the child's placement. However, after the initial estrangement during which each unwed mother sought adoption for the child—thus implicating the lives of hopeful adoptive parents—the biological parents reunited and the mother thereafter supported the father's efforts to gain custody of the child. No question of fitness or abandonment is in issue.

In *Raquel Marie*, on November 4, 1988, approximately three months after the child was placed for adoption, the biological parents—Louise and Miguel—were married, but they do not have custody of the child, who has lived virtually her entire life with her adoptive parents in New Hampshire. The trial court, after a hearing limited to the issue of the need for Miguel's consent under Domestic Relations Law § 111(1)(e), concluded that while Louise and Miguel lived separately in the relevant six-month period before placement—during which he several times assaulted her—they had a sufficiently continuous and ongoing relationship to meet the "living together" requirement of the statute, loosely construed; the court additionally found that, in

the key six-month period, Miguel had openly held himself out as the child's father and contributed to the pregnancy and birth expenses, thus entitling him to veto the adoption.

The Appellate Division took a different view of the couple's tumultuous relationship in the six months preceding placement, concluding that it was "neither normal nor stable." (150 AD2d at 26.) In that Miguel failed to satisfy the "living together" requirement of the statute, the Appellate Division determined that he had no right to veto the adoption. While the court explicitly premised its holding Miguel's failure to meet the "living together" requirement, it additionally observed that there was little evidence of Miguel's compliance with the remaining two requirements of Domestic Relations Law § 111(1)(e), or of any effort on his part to manifest substantial parental responsibility. Miguel's appeal is before us as a matter of right, on a constitutional question (CPLR 5601[b]).

In *Baby Girl S.*, while the biological parents (Regina and Gustavo) also did not live together in the relevant six-month period preceding the child's placement, the affirmed findings of the Surrogate established a course of conduct over several months that prevented Gustavo from even knowing of the pregnancy or his paternity, thus rendering literal compliance with the statute impossible. The Surrogate, unanimously affirmed by the Appellate Division, concluded that the adoption should fail both because of fraud of the adoptive parents during the proceeding and because – reading a "savings clause" into the statute for prevention by others – Gustavo did as much as possible to fulfill the statutory requirements and therefore was entitled to veto the adoption. The Surrogate on November 15, 1988, ordered the child transferred from the adoptive parents to Gustavo, with whom she has since remained. After the Appellate Division affirmance, we granted the prospective adoptive parents' motion for leave to appeal.

Concluding that the "living together" prong of Domestic Relations Law § 111(1)(e) renders the statute unconstitutional, we now reverse the Appellate Division order in *Raquel Marie*; in *Baby Girl S.*, we affirm on the statutory ground and affirmed

findings of Gustavo's substantial parental interest, without reaching the question of fraud on the part of the adoptive parents.[1]

The New York Statute Against the Backdrop of Five Supreme Court Cases[2]

Assessment of the New York statute and the parties' claims regarding its validity can only be undertaken in the context of the five Supreme Court cases that have shaped the constitutional contours of the unwed father-child relationship.

The evolution of the case law, and corresponding amendments of the New York statute, are themselves a commentary on changing family patterns and social attitudes toward unwed fathers (*see generally*, Note, *Certainly Not Child's Play: A Serious Game of the Hide and Seek with the Rights of Unwed Fathers*, 40 Syracuse L Rev 1055 [1989]; Raab, *Lehr v Robertson: Unwed Fathers and Adoption – How Much Process is Due?*, 7 Harv Women's LJ 265 [1984]; Note, *Caban v Mohammed: Extending the Rights of Unwed Fathers*, 46 Bklyn L Rev 95 [1979]; Note,

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[1] While the issue is not necessary to our disposition in this case, we cannot overlook the extensive affirmed findings of fraud on the court. Fraud on a court is intolerable in any proceeding; it is particularly so in adoption proceedings where misrepresentations may be calculated to circumvent statutory notice provisions and cut off constitutionally protected interests (*see, e.g.*, Domestic Relations Law § 111 [3][b]; *Bennett v Jeffreys*, 40 NY2d 543, 549).

[2] Before considering the constitutionality of the statute, we reject Miguel's contention that his marriage to Louise on November 4, 1988 – some five months after Raquel Marie's birth and three months after her placement for adoption – alone requires his consent to the adoption, pursuant to Domestic Relations Law § 24(1), which legitimates a child born out of wedlock when the parents subsequently marry. In this respect we agree with the Appellate Division that the consent of the father is *automatically* required only for the adoption "of a child conceived or born in wedlock" (*see* Domestic Relations Law § 24[1]). Acceptance of Miguel's argument would otherwise render that provision meaningless, and introduce a new uncertainty into every adoption; unwed parents could marry at any point before an adoption became final and thereby acquire an absolute veto (*see*, 150 AD2d, at 30). Miguel's alternative contention that the marriage fortifies his constitutional argument is dealt with at page 409, *infra*.

The Unwed Father's Rights in Adoption Proceedings: A Case Study and Legislative Critique, 40 Alb L Rev 543 [1976]; Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 Mich L Rev 1581 [1972]).

Until the 1970's, unwed fathers had no legally recognized interest. That point is amply illustrated by the 1972 Supreme Court decision in *Stanley v Illinois* (405 US 645), where children born during a nonmarital cohabitation that spanned 18 years, under Illinois law became wards of the State upon their mother's death.

Stanley established that a father's interest "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection" (*id.* at 651); the sense of the parental tie as a fundamental interest appears throughout the Court's opinions in this area. Illinois' blanket assumption that all unwed fathers were unfit was found to have violated both equal protection and due process, which entitled Stanley to a hearing on his fitness as a parent before the State could terminate his parental rights. The Supreme Court rejected the State's claim that unmarried fathers could reasonably be presumed unqualified to raise their children, and recognized that a father in Stanley's situation had a constitutional interest in his relationship with his nonmarital children entitled to the same protection against State interference as the interest of other custodial parents.

Following *Stanley*, the New York Legislature in 1976 added Domestic Relations Law § 111-a, for the first time requiring that an unwed father in enumerated circumstances be given notice of an adoption proceeding, which would then entitle him to present evidence relevant to the best interests of the child (L 1976, ch 665). Still an unwed father in New York had no right to veto an adoption to which the mother had consented.

In 1978, relying on *Stanley*, Leon Quilloin sought the right to veto the adoption of his 11-year-old child by the boy's stepfather. While Quilloin's name appeared on the birth certificate, he never had custody, or regularly supported or visited the child, nor did he attempt to legitimate him until receiving notice of

the proposed adoption. Rejecting Quilloin's equal protection and due process claims, the Supreme Court identified the issue, unresolved by *Stanley*, as one of the *degree of protection* a state must afford "the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial." (*Quilloin v. Walcott*, 434 US 246, 248).

Noting its long recognition that the relationship between parent and child is a constitutionally protected one, the Court stated that it had little doubt that the Due Process Clause would be offended if the State were to attempt to break up a biological family over the objection of parents and children solely in the perceived best interests of the children. However, it found no violation in view of Quilloin's failure to have or seek custody of his son, where the result of the adoption would be to give legal recognition to an existing family unit. The nature of Quilloin's actual relationship with his son was also central to the Court's rejection of his equal protection claim. The Court emphasized that he "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child" (*id.* at 256) – a responsbility that a once-married father would have exercised during marriage – and the absence of such a relationship justified differential treatment.

Stanley involved an unwed father with actual custody of his children at the time the State attempted to terminate his parental rights, *Quilloin* an unwed father who had never had custody. *Caban v. Mohammed* (441 US 380) – decided in 1979, just one year after *Quilloin* – concerned an unwed father who for several years, but no longer, had custody of his children. Under the New York law then in effect, he was entitled only to notice of the proposed adoption and an opportunity to present evidence on the children's best interests.

A sharply divided Supreme Court struck down the New York statute on equal protection grounds, applying the intermediate level of scrutiny applicable to gender-based distinctions and concluding that the "undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a

substantial relationship to the State's asserted interests." (*Id.* at 394.) Since Caban and his children had lived together as a family for several years, the "case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother." (441 US, at 389.) While agreeing the State had important interests in furthering the adoption of nonmarital children into "a normal, two-parent home" (*id.* at 391), the majority concluded that gender-based distinction of § 111 was too broad to be substantially related to this interest.

According to the State, a requirement of the consent of unwed fathers would impede the adoption process because they are often impossible to locate, whereas mothers tend to remain with their children. Specifically reserving the question whether such difficulties would justify different treatment concerning newborn adoptions, the majority found that in the case of older children, the State's problem could be solved by a more finely-drawn distinction, as in "cases where the father has never come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." (*Id.* at 392.)

In an effort to bring New York's statute into compliance with *Caban*, the Legislature in 1980 amended Domestic Relations Law § 111 (L 1980, ch 575; *see*, Sponsor's Mem, 1980 New York State Legis Ann 242-243). Rejecting proposals to require the consent of all unwed fathers, the Legislature opted to provide them with a veto right only in specified circumstances which in its view objectively and unambiguously manifested that, through his efforts, here was a substantial, continuous, meaningful family relationship available to the child. Recognizing distinction between the adoption of newborns and older children, the Legislature set up one test for an unwed father's veto right in the case of an under-six-month child (Domestic Law § 111[1][e]) and a different test for an over-six-month child – requiring financial support, visitation and communication with the child (Domestic Relations Law § 111[1][d]). No exception is made in 111(1)(e) – as in 111(1)(d) – for prevention of the father's efforts

to satisfy statutory requirements by the person having custody of the child. That is essentially the statute before us today.

Twice since *Caban* the Supreme court has considered questions relating to the unwed father-child relationship, although Domestic Relations Law § 111(1)(e) was not in issue in either case. In 1982, in *Lehr v Robertson* (463 US 248), the Court sustained New York's notice statute — Domestic Relations Law § 111-a — in a case where the unwed father, seeking to block the stepfather's adoption, had never during the child's two years lived with her or the mother or provided financial support.

In *Lehr*, which rested solely on procedural due process grounds, the Court in defining the father's liberty interest characterized "the rights of the parents [as] a counterpart of the responsibilities they have assumed" (*id.* at 57), and emphasized that the Court's recognition of such rights had been, for the most part, in the context of a recognized family unit. Analysis of the previous three cases demonstrated the distinction between a mere biological connection and an actual relationship of parental responsibility. Commenting on the biological link, the Court stated that its significance was "that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." (*Id.* at 262.) As Lehr had never grasped the opportunity to form a relationship with his daughter, the due process issue was whether New York had given adequate procedural protection to his opportunity to do so, and the Court concluded that it had.

As for Lehr's equal protection claim, again emphasizing that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child" (*id.* at 266-267), the Court held that the New York statutes did not operate to deny Lehr equal protection, because he (like Quilloin)

had never established a substantial relationship with his child, and hence (unlike Caban) was not similarly situated with the child's mother.

Finally, only last term in *Michael H. v Gerald D.* (491 US ____, 109 S Ct 2333) the Supreme Court considered the constitutionality of the California statutory scheme governing the rights of a biological father of a child born to a woman married to and living with another man at the time of conception. While the efforts of the alleged biological father to gain visitation were denied, five Justices, in concurrence and dissent, indicated that such a father might have a constitutionally protected liberty interest in his relationship with the child when the mother was married to another man at the time of birth. Even the author of the two-Justice plurality opinion noted that the Court had previously assumed in *Lehr* that the Constitution might require that some protection be accorded the biological father's opportunity to develop a relationship with the child, and left open the question whether there would be a different result if the marital parents did not wish to raise the child as their own. The four dissenters found that Michael H. had fully met the Court's test for constitutional protection — he not only had a biological connection but also had come forward to participate in the child's rearing and shown a willingness to assume his parental responsibilities.

Thus, it is plain that within two decades the interest of unwed fathers in a relationship with their children has gained significant recognition in the law, and the dimensions of that interest are by now well defined. The protected interest is not established simply by biology. The unwed father's protected interest requires both a biological connection and full parental responsibility; he must both be a father and behave like one (*see*, Bartlett, *Re-Expressing Parenthood*, 98 Yale LJ 293 [1988]). When an unwed father promptly commits himself to custody—signifying "provision for the physical and emotional needs of children, provision of guidance and direction to children, and living with children on a day-to-day basis" (Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v Robertson*, 45 Ohio St LJ 313, 350 [1984])—in adoption proceedings by

strangers he is entitled to the constitutional due process and equal protection guarantees accorded other parents before his rights are terminated.

The Unwed Father's Constitutional Interest In the Case of Newborns

In the case of a child placed for adoption at birth, the father can have no more than a biological connection to the child, there having been no chance for a custodial relationship. Protection of his parental interest would depend, then, upon recognition of a constitutional right to the opportunity to develop a qualifying relationship with the infant.

That open question is before us today: is the full measure of constitutional protection – the right to a continued parental relationship absent a finding of unfitness – ever required where a child is placed for adoption before any real relationship can exist, and if so, what actions on the unwed father's part would demonstrate his willingness to take parental responsibility sufficient to give rise to such rights? We conclude that such an interest must be recognized in appropriate circumstances, and we do so as a matter of Federal constitutional law; the parties' exclusive reliance on Federal law affords us no basis for considering the issue under our own State Constitution.

In *Caban*, involving an unwed father who did not have a current custodial relationship with his children, the Court gave determinative significance to the fact that he nonetheless had demonstrated a continuing willingness to have such a relationship. Conversely, in *Lehr* and *Quilloin*, rejecting the fathers' claims that their relationships were also worthy of the maximum protection, the Court emphasized their failure to grasp such opportunities for a significant relationship as had been available. Thus, it is apparent that the biological parental interest can be lost entirely, or greatly diminished in constitutional significance, by failure to timely exercise it or by failure to take the available legal steps to substantiate it.

Consequently, in an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child (*see*, Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v Robertson*, 45 Ohio St LJ 313; see also, In re Adoption of B.G.S., 556 So 2d 545 [La 1990]; *In re Baby Girl Eason*, 257 Ga 292, 358 SE2d 459 [1987]). In *Lehr* in fact, Justice Stevens spoke of "the opportunity" the biological link offers the unwed father to develop an interest entitled to full constitutional protection (*Lehr v Robertson*, 463 US at 262, *supra*). This implies, however, that in order to have the benefit of the maximum protection of the relationship—the right to consent to or veto an adoption—the biological father not only must assert his interest promptly (bearing in mind the child's need for early permanence and stability) but also must manifest his ability and willingness to assume custody of the child (*see*, Buchanan, Op. cit., 45 Ohio St LJ at 362-368; *see also*, Note, *Certainly Not Child's Play: A Serious Game of Hide and Seek with the Rights of Unwed Fathers*, 40 Syracuse L Rev 1055, 1079-1084 [1989]).

Notably, in *Lehr* and *Quilloin*, the Supreme Court also emphasized that the result of permitting stepfather adoptions would be legal recognition of a *de facto* family already in existence, a State interest it viewed as outweighing the parental interests of the fathers who had not grasped the opportunity to solidify their relationships with their children. This State interest in recognizing the legal rights of a stepfather who *has* shouldered the parental role left open by the biological father's failure to do so, is not present in the cases before us, involving proposed adoption by parties who were strangers to the children.

This is not to say that the unwed father's failure to form ties with his newborn child may not be sufficiently great to constitute a sort of waiver or abandonment that would give rise to a State interest in providing the child with a permanent, stable home through adoption, as well as an interest on the part of prospective adoptive parents who have committed themselves

to the child. The unwed father's right is decidedly limited in duration. Nonetheless, a father who has promptly taken every available avenue to demonstrate that he is willing and able to enter into the fullest possible relationship with his under-six-month-old child should have an equally fully protected interest in preventing termination of the relationship by strangers, even if he has not as yet actually been able to form that relationship.

The Relation Between the State Interest and the Private Interest

Where a fundamental interest of this nature is at issue, any legislation limiting or burdening it at the very least must meet two tests: the statute must further a powerful countervailing State interest, and there must be a close fit between the governmental objective sought and the means chosen to achieve it. These standards would apply whether the analysis were undertaken as a matter of due process or equal protection (*see, Caban v Mohammed*, 441 US 380, *supra* [equal protection]; *Stanley v Illinois*, 405 US 645, *supra* [equal protection and due process]; *see also, Matter of Malpica-Orsini*, 36 NY2d 568, *and especially* 578 [Jones, J. dissenting], *app dsmd sub nom. Orsini v Blasi*, 423 US 1042).

Unquestionably, substantial State interests are at stake in the adoption laws generally, and the consent provisions particularly (*see, Matter of Malpica-Orsini, supra; see also*, McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 Ga L Rev 977 [1988]). The distinctions drawn in Domestic Relations Law § 111[1]), based on parents' gender and children's age, reflect the inherently different position, alluded to by Justice Stevens in his *Caban* dissent, of an unwed mother alone faced with the enormous responsibility of making crucial decisions about the future of her newborn child. As the child grows older, the urgency underlying certain of those decisions arguably diminishes, and at that point there may be less justification for requiring the biological father's participation rather than allowing him to fulfill his responsibilities through financial support and occasional visitation or communication, as contemplated by Domestic Relations Law § 111(1)(d). Moreover, as

Justice Stevens further noted, available statistics strongly indicate that infants are more likely to be adopted and more readily bond with adoptive parents. To the extent that the State has an interest in encouraging the adoption of these children, the statute promotes that end by limiting the necessity for paternal consent, thus making the process surer and speedier.

While the State cannot deny all unwed fathers who have never lived with their newborn children the right to veto adoption, plainly it can do a great deal to promote its own substantial interests, as well as the integrity of the adoption process. The State can deny a right of consent to all unwed fathers who do not come forward to immediately assume their parental responsibilities, and it can prescribe conditions for determining whether the unwed father's manifestation of interest in his child is sufficiently prompt and substantial to require full constitutional protection (*see, generally*, Note, *Unwed Fathers and the Adoption Process*, 22 Wm & Mary L Rev 85, 135-137 [1980]).

Domestic Relations Law § 111(1)(e) attempted to do precisely that. Indeed, the Legislature rejected an alternative proposal by the Law Revision Commission which envisioned according courts discretion to dispense with the unwed parent's consent where, in the court's opinion, the "parent has not manifested a significant parental interest in the child and is not prepared to assume the obligations of parenthood." (*1980 Report of NY Law Rev Commn, Recommendation to Legislature Relating to the Rights of Fathers in the Adoption of Children Born Out of Wedlock*, 1980 McKinney's Session Laws of New York, 1672, 1673-1674.) Instead, the Legislature chose the current requirements, which the bill's sponsor opined "follow the Supreme Court's opinion which accords protection to fathers who 'participated in the rearing' of the child, who *** had 'manifested a significant paternal interest in the child,' " and that the bill would be a "reasonable, unambiguous and objective standard to guide agencies and courts." (Sponsor's Mem, 1980 NY Legis Ann. at 243.)

The desire to fashion reasonable, unambiguous and objective standards is surely understandable in these matters of high

sensitivity. But given that unwed fathers who grasp the opportunity to shoulder the responsibilities of parenthood are entitled to as much protection of their rights in adoption proceedings as other parents, the "living together" requirement of Domestic Relations Law § 111(1)(e) – which cuts off their interest by imposing as an absolute condition an obligation only tangentially related to the parental relationship – cannot stand.

Where the State interest is in determining the existence of a significant parental concern for a relationship with the child, the difficulty with the "living together" requirement stems from its focus on the relationship between father and mother, rather than father and child. When the child is surrendered for adoption by the mother at birth – as in the case of *Baby Girl S.* – under Domestic Relations Law § 111(1)(e) the father can qualify for a veto right only if he has continuously lived with the mother for a full six months preceding the birth – in which case it seems unlikely that there would even be a conflict between father and mother on the question of adoption. Even if a father theoretically could qualify by living only with the child during a portion of the period prior to placement, by definition the statute in every instance requires some period of living with the mother, which does not establish parental responsibility toward the child.

The "living together" requirement can easily be used to block the father's rights. But even more significantly, it permits adoption despite the father's prompt objection even when he wishes to form or actually has attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard.

Nor does the "living together" requirement sufficiently further the State interest. The other two requirements of Domestic Relations Law § 111(1)(e) – public acknowledgement of paternity within the six month period preceding placement, and payment of pregnancy and birth expenses – already ensure that the father is both identifiable and, to some extent, ready to support the child financially. At any rate, the "living together" requirement adds nothing to either of those important considerations. Although the State plainly has a significant interest in

fostering the well-being of the child by ensuring swift, permanent placement (*see*, Note, *Lehr v Robertson: Putting the Genie Back in the Bottle: The Supreme Court Limits the Scope of the Putative Father's Right to Notice, Hearing and Consent in the Adoption of his Illegitimate Child*, 15 U Tol L Rev 1501, 1550-1553 [1984]), the State's objective cannot be constitutionally accomplished at the sacrifice of the father's protected interest by imposing a test so incidentally related to the *father-child* relationship as this one, directed as it is principally to the *father-mother* relationship.

Finally, the adoptive parents argue that the requirement promotes a strong State interest in assuring that the child has "stable" family relationships, presumably meaning a two-parent family. While the requirement might at first blush appear to promote that result between the biological parents, any connection between that objective and the means chosen to promote it disappears with the realization that the issue arises only when, over the father's objection, the mother has surrendered the newborn infant and consented to adoption. Moreover, it is hardly obvious that the State has a sufficiently strong interest in ensuring that children are raised in a two-parent family to defeat the biological father's right to a parental relationship. Indeed, since the State permits adoption by a single adult (Domestic Relations Law § 110), this argument also fails.

Accordingly, the "living together" requirement specified in Domestic Relations Law § 111(1)(e) renders the statute unconstitutional as there is an insufficient fit with any valid State interest.

The remaining two statutory requirements are in a sense overlapping, since an acknowledged father under Family Court Act § 514 is already required to pay certain pregnancy and birth expenses. Although Domestic Relations Law § 111(1)(e) is challenged only as to the "living together" requirement, we know with certainty from the format of the existing statute as well as the contemporaneous expressions of intent that the Legislature would not have wished to have the unchallenged portions of

the statute stand alone as the sole measure of an unwed father's commitment to the child, entitling him to veto an adoption. Therefore, while mindful of the extraordinary significance of so doing, we have no recourse but to declare § 111(1)(e) unconstitutional in its entirety.

We recognize from a mere statement of the problem, from the considerable commentary on the subject, and from the wide array of approaches taken by other states—which do not impose our "living together" requirements[3] — that it is no easy task to formulate unambiguous standards that both encapsulate the qualifying relationship and protect all of the important interests involved. Nonetheless, that effort is required.

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[3] Illinois, for example requires that the father have lived with the *child* for at least half the length of its life prior to placement (with no reference to living with the mother) unless prevented from doing so (Ill Ann Stat, ch 40 ¶ 1510 § 8[a][3]), and South Carolina has requirements similar to Domestic Relations Law § 111(1)(e), but in the disjunctive (SC Code Annot., § 20-7-1690[5]). In Maine, a putative father named in the birth record, or currently providing or attempting to provide support, or involved in or attempting to be involved in a family relationship with the child, upon notice must petition for custody of the child. If the court finds that paternity has been established, and that the father is willing and able to take custody, he has the right to consent to the adoption (Me Rev Stat Ann at Tit 19 § 532-C.). Other states require that the unwed father have established paternity prior to the adoption proceeding (*see, e.g.*, Ark Code Ann at § 9-9-206[a][2]; Burns Indiana Stat Ann at § 31-3-1-6[a][2]), or even simply require consent of both biological parents (*see* 2A Ariz Rev Stat Ann § 8-106). A number of states have granted veto rights to unwed fathers on condition that they file a notice of paternity and intent to support the child within specified time limits—which may be as short as five days—provided they have not otherwise abandoned the child (*see, e.g.*, Utah Code Ann at § 78-30-4; Neb Rev Stat § 43-104.02).

Strict construction of the cited statutes has generally been upheld against constitutional challenge, although in several cases involving the affirmative thwarting of the father's efforts to pursue his parental rights, they have been held unconstitutional as applied (*see, In re Application of S.R.S. and M.B.S.*, 225 Neb 759, 408 NW 2d 272 [1987]); *Wells v Children's Aid Soc'y*, 681 P 2d 199 [Utah 1984]; and *Ellis v Social Servs. Dept. of Church of Jesus Christ of Latter Day Saints*, 615 P2d 1250 [Utah 1980]; *see also*, 1990 Utah Laws Ch 245 [revised statute allows father to assert interest upon proof of impossibility of timely filing]).

Application of the Law to the Facts

Establishing a proper substitute is of course the prerogative of the Legislature, not the courts. Until there is new legislation, however, it will be necessary for courts to resolve cases before them – including the two present appeals. In setting forth criteria that are to be considered by courts needing in this interim period to determine whether an unwed father has established the requisite interest for a right of consent, we underscore that we are not prescribing necessary or even appropriate elements for any new statute, or speculating as to its constitutionality.

While the Legislature might ultimately adopt different criteria, in this period courts will be guided by principles gleaned from the Supreme Court decisions, which define an unwed father's right to a continued parental relationship by his manifestation of parental responsibility. In the case of newborn infants, we take this to mean that the qualifying interest of an unwed father requires a willingness himself to assume full custody of the child – not merely to block adoption by others. In this connection, any unfitness, or waiver or abandonment on the part of the father would be considered by the courts, as they would whenever custody is in issue (*see, Bennett v Jeffreys*, 40 NY2d 543).

An assertion of custody is not all that is required. The Supreme Court's definition of an unwed father's qualifying interest recognizes as well the importance to the child, the State and all concerned that, to be sufficient, the manifestation of parental responsibility must be prompt. In reaching this determination, courts should give due weight to the remaining portions of Domestic Relations Law § 111(1)(e), which were directed to that same objective and are unchallenged in this litigation. Perhaps most significantly they establish the period in which the father's manifestation of responsibility for the child is to be assessed – the six continuing months immediately preceding the child's placement for adoption. The interim judicial evaluation of the unwed father's conduct in this key period may include such considerations as his public acknowledgement of paternity, payment

of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child.

Applying such considerations leads us to affirm the Appellate Division order in *Baby Girl S.*, where there are extensive affirmed findings supported by the record to sustain the unanimous conclusion reached by the courts that Gustavo, the biological father himself seeking full custodial responsibility virtually from the time he learned of Regina's pregnancy, did everything possible to manifest and establish his parental responsibility. The Surrogate recited Gustavo's persistent and uniformly rebuffed expressions of concern, offers of support and requests for custody, as well as his legal efforts to establish paternity and secure custody – within the six months preceding the infant's placement – concluding from the evidence that he was "a concerned father" (141 Misc 2d at 915), that he "obviously did all he could have done under the circumstances" (*id.* at 916), and that "Gustavo's concern for his child is, at the very least, as substantial and significant as Mr. Caban's concern for his children." (*Id.*, at 917.)

Though Miguel also wishes to assume custody, we cannot conclude in *Raquel Marie* that in the key six-month period he established his parental responsibility, and the matter must be remitted to the Appellate Division for further review of the facts. Having held that Miguel failed to satisfy the "living together" prong of 111(1)(e), the Appellate Division stated that it did not need to go any further in its factual review, observing only that "little evidence of compliance with [the remaining two statutory] requirements was adduced by the natural father in this case." (*Id.* at 29.) Thus, while the trial court was satisfied that Miguel had manifested parental responsibility sufficient for a veto over the child's adoption, the Appellate Division explicitly did not complete a review of the facts necessary to that determination.

Nor is the need for further review obviated by the fact of the marriage, as Miguel contends. Marriage obviously may be considered as one factor in determining whether the father has

manifested the requisite parental responsibility, but the marriage must be timely in order to be considered substantial. It is surely not impermissible for the State, in order to protect children and prospective adoptive parents from heartbreak and uncertainty, to impose as a requirement for the automatic right of consent to adoption of a newborn infant that any marriage take place by the time the child is born (Domestic Relations Law § 24[1]).

Accordingly, in *Raquel Marie* the Appellate Division order should be reversed, with costs, and the matter remitted to the Appellate Division for further proceedings in accordance with this Opinion, and in *Baby Girl S.* the Appellate Division order should be affirmed, with costs.

* * * * * * * * * * * * * * * * * *

Case No. 133: Order reversed, with costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

Case No. 134: Order affirmed, with costs. Opinion by Judge Kaye. Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock and Bellacosa concur.

Decided July 10, 1990

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

2926w
J/hu

Argued - June 27, 1989

AD2d

LAWRENCE J. BRACKEN, J.P.
JOSEPH J. KUNZEMAN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

2459E

In the Matter of Raquel Marie X. Anonymous). Mr. and Mrs. C. (Anonymous), appellants; Mr. and Mrs. T. (Anonymous), respondents.

OPINION & ORDER

Appeal in an adoption proceeding by the proposed adoptive parents, from so much of an order of the Family Court, Westchester County (Louis A. Barone, J.), entered May 10, 1989, as denied their petition for adoption of the infant Raquel Marie.

Alan D. Scheinkman, White Plains, N.Y., and Fink, Weinberger, Fredman, Berman, Lowell & Fensterheim, P.C., White Plains, N.Y. (Alan D. Scheinkman and Ronald J. Bavero of counsel), for appellants.

Domenick J. Porco, Scarsdale, N.Y., for respondent Mr. T.

Richard S. Birnbaurn, White Plains, N.Y., for respondent Mrs. T.

Richard J. Strassfield, Eastchester, N.Y., law guardian on behalf of the child.

Robert Abrams, Attorney-General, New York, N.Y. (Robert J. Schack of counsel), in his statutory capacity under Executive Law § 71.

PER CURIAM.

In this appeal from the denial of an adoption petition, we are confronted with the question of whether the consent of the natural father to the proposed adoption of the infant child Raquel Marie is required pursuant to Domestic Relations Law § 111(1)(e). Based upon the following discussion, we conclude that it is not.

Raquel Marie's natural parents first met in 1983 or 1984 while both were attending high school. A tumultuous relationship followed. On August 10, 1986, the natural mother gave birth to a daughter, Lauren Louise. Shortly thereafter, the unmarried couple began to discuss the idea of living together, inasmuch as they were residing in the homes of their respective parents at the time. However, they did not begin to cohabit until mid or late April 1987, when they and Lauren took up residence in an apartment. The cohabitation was short-lived, for in late May 1987 certain rumors arose concerning the purported infidelity of the natural father, prompting the natural mother to vacate the premises and return to her parents' home with Lauren. The natural father likewise returned to the home of his parents, and the couple continued to see each other sporadically. In the summer of 1987 the natural mother procured an abortion without telling the natural father. This action greatly angered the natural father. In October 1987 the couple learned that the natural mother was again pregnant. Their relationship deteriorated, and the natural mother obtained an order of support due to the natural father's failure to properly provide for Lauren, as well as numerous orders of protection necessitated by the violent

conduct of the natural father. The natural mother also accused the natural father of raping her and, due to his repeated assaults on her person and his violation of orders of protection, filed at least three separate criminal complaints against him.

Raquel Marie, the child who is the subject of the instant adoption proceeding, was born on May 26, 1988. Her birth certificate did not set forth the name of her natural father. Her natural parents remained unmarried and were not cohabiting at the time of her birth. For approximately one week after the child's birth, the natural father "was spending the nights" with the natural mother at an apartment in which she had taken up residence. However, as the natural father conceded at the hearing, he did not continue this practice because "we were arguing, and I thought it wasn't safe to stay there at night".

When Raquel Marie was approximately one-month old, the natural mother placed her with the Spence-Chapin Agency for adoption, claiming that she was unable to care for two children. At the natural father's insistence, the child was retrieved from the agency. However, on July 22, 1988, the natural mother executed a consent to adoption and surrendered Raquel Marie to an attorney. The attorney then gave the child to the proposed adoptive parents, with whom the child has resided ever since. On July 19, 1988, the natural father had commenced a custody proceeding against the natural mother. An order of filiation was entered upon his consent on August 19, 1988. Although the natural parents had discussed marriage on numerous occasions in the past, they did not marry until November 4, 1988, and the natural mother then joined in the natural father's attempt to obtain custody of Raquel Marie. The proposed adoptive parents then commenced this proceeding in January 1989 to finalize the adoption. The natural parents opposed the petition and sought the return of the child, essentially contending that the natural father's consent to the adoption was required and had not been obtained, and that the consent of the natural mother to the adoption was invalid. The Family Court, Westchester County directed that a hearing be held to resolve the dispute. The court bifurcated the hearing, limiting the

evidence solely to the issue of whether the natural father's consent to the adoption was necessary.

At the conclusion of the hearing, the Family Court rendered a decision which accurately characterized the natural parents' relationship as one which was turbulent, marred by mutual suspicion as well as assaultive behavior on the natural father's part, and neither normal nor stable. However, the court concluded that the natural father had sufficiently met the requirements of Domestic Relations Law § 111(1)(e) and therefore, his consent to the adoption was necessary. Inasmuch as such consent was never obtained, the court denied the petition for adoption. We now reverse.

At one time, an unwed father in New York had no right to veto an adoption to which the biological mother had consented. In *Caban v Mohammed* (441 US 380), the United States Supreme Court declared the predecessor statute of Domestic Relations Law § 111 unconstitutional insofar as it created a gender-based distinction violative of the Equal Protection Clause by requiring only the consent of the mother for an adoption. In response to *Caban v Mohammed (supra)*, the New York State Legislature amended Domestic Relations Law § 111 in 1980, thereby granting unmarried fathers certain veto rights with regard to adoptions in particularized circumstances and when certain conditions have been met. The legislative history underlying the amendment demonstrates that the criteria set forth in Domestic Relations Law § 111(1)(e), which are applicable herein, are to be considered mandatory rather than permissive (*see*, 1980 N.Y. Legis Ann, at 242). Accordingly, with respect to children who are born out of wedlock and placed for adoption less than six months after birth, Domestic Relations Law § 111(1)(e) provides as follows: ***

> "Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: ***
>
> "(e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if:

> (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child."

The foregoing provision serves the salutary purpose of ensuring that the consent of an unmarried father to an adoption will be required where a meaningful family relationship has been established. Conversely, as we noted in *Matter of "Female" D.* (83 AD2d 933, 935):

> "the preadoption consent of the unwed father of an infant under the age of six months is not required where the father has failed to satisfy such legislatively prescribed criteria as are intended to demonstrate that the newborn infant has a functioning male parent (and, therefore, a *de facto* family) available to him or her".

Indeed, the statutory requirements of Domestic Relations Law § 111(1)(e) are not to be taken lightly, for:

> "[t]he Legislature has determined * * * that an unwed father must show that he has offered at least minimal support to the mother and child and created some semblance of a family unit before his consent will be required for the adoption of an infant placed for adoption before the age of six months. Where an unwed father has failed to provide this stability and support, *as evidenced by compliance with the requisite statutory criteria*, it is in the interests of the infant, of the society in which the infant will live, and of the unwed mother, if she consents, to have the child adopted into a home where such stability and support will be provided" (*Matter of Michael Patrick C.*, 83 AD2d 932, 933 [emphasis supplied]).

Put another way, "[the] statute *** only requires the consent of those fathers of children born out of wedlock who have established a substantial relationship with the child" (*Matter of Catholic Child Care Socy. [Danny R.]*, 112 AD2d 1039, 1041).

With respect to the present case, we initially reject the natural parents' suggestion that Domestic Relations Law § 111(1)(e) is constitutionally flawed. We have previously upheld this provision as constitutional in *Matter of "Female" D, (supra)* and *Matter of Michael Patrick C. (supra)*. Indeed, in *Matter of "Female" D (supra*, at 935), we elaborated on the constitutionality issue as follows:

> "where the unwed father is available to the child through his presence and his financial support (see Domestic Relations Law, § 111, subd 1, par [e]), the father is afforded a voice regarding the adoption of the infant and his consent is required. Where, however, the unmarried father does not meet these criteria, the adoption may go forward merely upon the consent of the mother. In our view, the foregoing statutory scheme effectively promotes the adoption of illegitimate newborns into stable adoptive families. The statute requires the consent of ***both*** parents where a ***de facto*** family unit has been created through the efforts of the natural father but, at the same time, precludes an absentee biological father from frustrating the attempts at adoption undertaken by the natural mother in the perceived best interests of the child where she is the only parent available to it. Thus, the statute 'serve[s] important governmental objectives and [is] *** substantially related to [the] achievement of those objectives' (*Califano v Webster*, 430 US 313, 316-317, quoting *Craig v Boren*, 429 US 190, 197). It therefore satisfies the constitutional test for a gender-based classification".

Inasmuch as Domestic Relations Law § 111(1)(e) provides logical, objective and eminently sound indicia by which to determine

whether an unmarried father has manifested the intent to establish a substantial familial relationship with an infant born out of wedlock, we discern no basis for departing from the above-expressed view.

Turning to the facts of the instant case, we conclude, contrary to the findings of the Family Court, that the natural father has fallen far short of demonstrating that he took meaningful steps to establish a family unit. Our analysis of his compliance with Domestic Relations Law § 111(1)(e) need not extend beyond the first statutory criterion (*i.e.*, the requirement that he openly live with the child or the child's mother for a continuous period of six months immediately preceding the child's placement for adoption). Indeed, as conceded by the natural father's attorney at the hearing before the Family Court, there was no such cohabitation during the six-months period prior to Raquel Marie's placement except for a one-week interval following the child's birth. Moreover, the biological father's contact with the biological mother during the entire six-month period was sporadic and often culminated in violent and abusive behavior. Additionally, while it is unnecessary for us to consider the criteria set forth in Domestic Relations Law § 111(1)(e)(ii) and (iii), regarding public acknowledgment of paternity and acceptance of the financial responsibilities which accompany fatherhood, we note that little evidence of compliance with these requirements was adduced by the natural father in this case. Accordingly, we need not presently decide the issue of whether and under what circumstances something less than 100% compliance with the criteria set forth in Domestic Relations Law § 111(1)(e) may satisfy the statute and require an unmarried father's consent to an adoption. The record overwhelmingly demonstrates that, even under a relaxed interpretation of the statute, the natural father's efforts to establish a substantial family relationship in this case were woefully inadequate.

We further note that the reliance of both the natural father and the Family Court upon the decision in *Matter of Baby Girl S.* (141 Misc 2d 905, *affd without opinion* 150 AD2d 993 is misplaced. In that case, an adoption proceeding was dismissed

on the ground of fraud and misrepresentation. No similar issue is presently before us. While the decision in *Matter of Baby Girl S. (supra)* went on to state that the requirement of strict compliance with the criteria set forth in Domestic Relations Law § 111(1)(e) would work an unconstitutional result where the natural mother rebuffed the natural father's repeated efforts to establish a substantial family relationship, that discussion constituted mere dicta. Moreover, the First Department's affirmance without opinion of the Surrogate Court's decision and order in that case does not constitute appellate authority for the analysis set forth therein. Most significantly, there is simply no persuasive evidence in the record before us to demonstrate that the natural father in this case made every effort to establish a substantial family relationship, or that any such purported efforts were thwarted by improper behavior on the part of the natural mother. While the natural mother may have exhibited some reluctance to see the natural father on certain isolated occasions, such reluctance is hardly surprising given his domineering, violent and assaultive conduct. Moreover, he failed to demonstrate any genuine effort to overcome her reluctance (*see generally, Matter of Emily Ann*, 137 Misc 2d 726). Hence, inasmuch as he has failed to fulfill the statutory criteria, we conclude that the natural father's consent to the proposed adoption of Raquel Marie is unnecessary (*see, e.g, Matter of "Female" D., supra; Matter of Michael Patrick C., supra).*

Only one other contention of the natural parents merits brief mention. They maintain that their marriage on November 4, 1988, more than five months subsequent to Raquel Marie's birth and more than three months after her placement for adoption, operates retroactively so as to require the biological father's consent to the proposed adoption. This contention is without merit. While the marriage of the parents of a child born out of wedlock serves to legitimatize the child (*see* Domestic Relations Law 24[1]), it is nevertheless clear that the consent of the father is automatically required only for the adoption "of a child conceived or born in wedlock" (Domestic Relations law § 111[1b]). Where, as in the instant case, the adoptive child is neither conceived nor born in wedlock, the consent of the father will be

required only, if he can satisfy the criteria set forth in Domestic Relations Law § 111(1)(d) or (e). Acceptance of the natural parents' present contention would render these latter statutory provisions meaningless and would create uncertainty in adoption proceedings by permitting unwed parents to marry at any point prior to an adoption being finalized and thereby acquire the power to veto the proposed adoption. Such a result is untenable in light of the clear statutory language. Accordingly the petition for adoption was improperly denied on the ground that the consent of the natural father was required

Finally, we note that the Family Court inprovidently exercised its discretion in ordering a bifurcated hearing to determine whether the natural father's consent to the adoption was required, before receiving evidence on the question of the validity of the natural mother's consent, which was also in issue. Under the facts and circumstances of this case we believe that it should be remitted to another Judge of the Family Court for a prompt hearing regarding the validity of the natural mother's consent to the adoption and resolution of any remaining issues.

BRACKEN. J.P.. KUNZEMAN. SULLIVAN and BALLETTA, JJ., concur.

ORDERED that the order is reversed insofar as appealed from, on the law, and the matter is remitted to the Family Court, Westchester County, for further proceedings on the petition for adoption in accordance herewith, before a different Judge.

ENTER:

Martin H. Brownstein
Clerk

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X

In the Matter of the Adoption of a Child Whose First Name is RAQUEL MARIE.

DECISION AND ORDER

Docket No. A-4-89

----------X

HON. LOUIS A. BARONE:

There is presented to the Court a most distressing and heart-rendering proceeding. Adoption proceedings usually bring with them an aura of joy and fulfillment. At bar, we have five lives at bay.

The Petitioners, Robert and Ana C., seek to finalize the adoption of the child Raquel Marie. This proceeding is contested by the biological parents Louise N. T. and Miguel T. Louise T. alleges that her consent and surrender of the child were fraudulently obtained and further, that she revoked said surrender and the child should be returned to her.

The Respondent, Miguel T., alleges that his consent as the father of he child is required and refuses to give said consent. The Petitioners contend that Respondent, Miguel T., does not comply with Domestic Relations Law Section 111(1)(e) and therefore the adoption may proceed.

The prevailing section provides "(1) subject to the limitations hereinafter set forth consent, to adoption shall be required as follows:

(e) of the father, whether adult or infant of a child born out-of-wedlock who is under the age of six months at the time he/she is placed for adoption, but *only if*:

(i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and

(ii) such father openly hold himself out to be the father of such child during such period; and

(iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child." (emphasis added).

At the outset of the proceedings, the attorney for Miguel T. conceded that in the event the Court literally interpreted Domestic Relations Law Section 111(1)(e), his client failed to comply with that provision requiring the father to have lived openly with the mother or the child "for a continuous period of six months immediately proceeding the placement of the child for adoption."

The Law Guardian had suggested that the Court consider a bifurcated proceeding. Only the issue of the father's consent would be heard, because a decision thereon could be dispositive of the entire proceeding. If the Court found the father's consent was required, adoption proceeding would fall and the child would be returned to the biological parents. If the father's consent was not required, the Court would then proceed to issue the mother's consent, and depending on the determination made therein the adoption would be granted or denied.

All counsel and parties agreed to proceed solely on the issue of the father's consent. The Court further ruled that evidence could be presented to show "de facto" compliance with that portion of the statute that required the parties to live together. The Court would consider testimony and evidence of all acts and events, which if viewed "in toto" would indicate compliance.

Several other "housekeeping" rulings were consented to prior to the commencement of the proceedings. The adoptive parents and the child reside in New Hampshire. The biological parents are residents of New York. All parties agreed to submit to the jurisdiction of the New York Courts and to waive any objection to the matter being heard and determined by this Court.

All parties further agreed to permit a newspaper reporter present during the proceedings with the understanding that any printed report of the proceeding would not reveal the last names of the natural or adoptive parents or the subject child.

It was further agreed, that Respondent, Miguel T., had the burden of "going" forward to prove compliance with the statute.

Certain issues of fact have been conceded by all parties:

1. Louise N. T. and Miguel T. are the biological parents of the child Raquel Marie.

2. At the time of the child's birth Louise N. and Miguel T. were not married.

3. The child Raquel Marie was born on May 26, 1988.

4. Louise N. and Miguel T. while unmarried, were the biological parents of a child Lauren born August 10, 1986.

5. Raquel Marie was placed with the adoptive parents Robert and Ana C. on July 22, 1988.

6. Louise N. and Miguel T. were subsequently married on November 4, 1988.

The Respondent, Miguel T., then proceeded to submit his evidence as to each element of the statute.

Miguel T. (hereinafter referred to as Michael T.) testified that he and Louise had an off again/on again relationship for several years. They met in high school and dated during 1984 and 1985. In the Fall of 1985, Louise became pregnant with the child Lauren. During this pregnancy, Louise sometimes lived at his parents' home and at her parents' home. They took Lamaze classes together to prepare for the baby, he drove her to the hospital on her due date and was present during the actual birth of the child. Lauren was born on August 10, 1986. He testified that they discussed marriage but Louise stated she didn't trust him enough to marry him. In her direct testimony, Louise N. confirmed Michael's statements.

In the Spring of 1987, Louise, Michael and Lauren moved into an apartment at 84 Dunwoodie Street in Scarsdale, New York. The three lived together until Louise moved out in or about August, 1987. At that point she went to live with her parents and he lived with his parents.

In October, 1987 Louise was complaining of back pains. Michael testified he made arrangements at a clinic called DOCS on Central Avenue, Yonkers, New York for Louise to be examined. He brought her for the examination and paid for same. It was as a result of that examination that they learned Louise was pregnant with the subject child.

Both Louise and Michael testified that in January or February, 1988 Michael made an appointment with Dr. Joan Adams, a gynecologist, to examine Louise and Michael paid for same.

On February 15, 1988 he called St. Agnes Hospital to arrange for a sonogram which was taken on February 18, 1988. Michael testified he paid $165.00 for said test.

In March of 1988, Michael bought a glider for Louise costing $310.00. Louise was complaining of back aches and had told him about this chair that eased her pain.

Because the private gynecologist was too expensive, Michael arranged for Louise to have her prenatal care at the St. Agnes

Clinic. The total cost for same was $850.00. Michael testified that in June, 1988 he reimbursed Louise the $850.00 she expended for medical care.

He further testified that after the child was born, he provided formula and diapers and whatever else Louise needed for the child.

This testimony was introduced to show "(iii) such father paid a fair and reasonable sum in accordance with his means for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child."

The next element to consider is whether Michael T. "(ii) openly held himself out to be the father of such child during such period."

Louise and Michael both learned of the pregnancy in October, 1987. Michael testified that in November, 1987 he, Louise and Lauren had Thanksgiving Dinner with the Licata family. During the dinner he advised his hosts that Louise was pregnant and he was the father. In December, 1987 they had Christmas Dinner with the DeLillo family and advised them of Louise's pregnancy.

In January, 1988 during a criminal proceeding Michael, through counsel, advised the Court that he was the father of Louise's unborn child.

Both testified that after the birth of the child, Louise brought both children (Lauren and Raquel) to baseball games in which Michael was a participant. On each occasion, Michael held the child and advsied his friends and teammates that Raquel was his new daughter.

Michael testified that prior to the birth of Raquel, Louise had mentioned placing the child for adoption. He told her he would never agree to same. Furthermore, if she could not handle the children he would take both.

Sometime in June, 1988 Louise had placed the child with the Spence-Chapin Agency. The child was there for some 20 days. On July 12, 1988 Louise had gone to Spence-Chapin to visit the child and was informed the child was not available. Raquel had been brought to a doctor for an examination. After demanding the return of the child, Louise called Michael to come to the agency. Upon his arrival, he too demanded the return of the child. Within a period of time thereafter, Louise, Michael and Raquel left the agency together.

On July 19, 1988, after the birth of Raquel, Michael T. filed a paternity petition and a custody petition in the New Rochelle Family Court on behalf of Raquel wherein he named Louise N. as Respondent.

The Court records indicate that the petitions were personally served on Louise on July 25, 1988, three days after the child was surrendered by Louise. On August, 16, 1988 Louise N. appeared before the Family Court in New Rochelle with Michael T. and his attorney Dominick Porco, Esq.. Louise N. waived counsel and a bloodtest admitted Michael T. was the father of Raquel, consented to the entry of an order of filiation and requested no support. An order of filiation was entered by the Court on August 19, 1988. The custody petition filed on July 19, 1988 was subsequently withdrawn by Michael T. on January 5, 1989 subsequent to the marriage of the parties which took place on November 4, 1988.

Both Louise and Michael acknowledge that Michael's name does not appear on Raquel's birth certificate. However, both testified that after the birth of the child, Michael visited at the hospital and came at those special times reserved only for fathers so that he could feed Raquel.

The crucial element to be proved is whether Michael "openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement." Upon a literal reading of the statute, Respondent T. does not comply. But the Court agreed to take evidence to prove a "de facto" living occurred.

All parties agree Michael and Louise had a turbulent relationship. They were suspicious of one another, they didn't trust one another. However, each testified that on several occasions each requested the other to consent to a marriage. Nonetheless, each had the company, society or comfort of the other without total obligation.

Even in light of the assaults, serious as they were, committed by Michael against Louise, they never truly separated themselves from one another. Louise received two temporary and one permanent order of protection against Michael for the beatings she received from him. Nonetheless, she continued to see him, sleep with him and after March, 1988 not violate him for breaching the order of the Court.

Admittedly, the only times that Louise and Michael physically resided together for any continuous period was from approximately April, 1987 to July, 1987 at 84 Dunwoodie Street, Scarsdale, and then for one continuous week after Louise brought Raquel home from the hospital at Louise's apartment on Collins Avenue, Mount Vernon, New York.

Both parties acknowledge they lived together "part time". The fact of the matter is they lived together whenever they found it convenient. Their relationship could in no way be characterized as "normal" or "stable". But for them it was "continuous", ongoing and constant. Regardless of the violence or suspicion each directed toward the other, they looked for and to one another.

Michael T. did not "live" with Louise in the true sense of the word. But between them their consistent behavior "created some semblance of a family unit". (In the Matter of Michael Patrick C., 83 AD 932, 933.)

In the Matter of "Female D.", 83 AD 2d 933, 935, the Court gave some indication that perhaps the statute should not be literally construed. The Court did not consider the question per se, but did open the door in stating that perhaps "*other criteria* might also serve the purpose of demonstrating that an unwed

father is available to his infant so that the father's pre-adoption consent should be required". (emphasis added.) The fact pattern presented in "Female D." did not require the Court to go beyond the statute.

However, the Surrogate of New York County did pick up the gauntlet in the Matter of "Baby Girl S." (New York Law Journel, November 10, 1988). In that case, the mother concealed the fact of her pregnancy, refused to live with the biological father and had placed the child without his knowledge, thus making it impossible for him to comply in any way with the criteria set forth in Domestic Relations Law Section 111(1)(e). With those facts before her, Surrogate Roth held "the Court therefore must determine initially whether the statute in question requires literal compliance or whether its objective was to require that an unwed father demonstrate his interest in his child by some established standards." By "other criteria".

To determine the case at bar in a strictly literal manner would not pose any difficulty.

The main element of living together was not thwarted by either party. The testimony presented implies they were both confortable with their arrangement. If the parties agreed on their own not to live together, then the Court must look for other acts which indicate the Respondent, Michael T., "manifested a significant continuous interest in his child". (Matter of "Baby Girl S." Ibid.)

In the Matter of "Baby Girl S." the Court discusses the significance of the biological connection and the necessity to develop and nurture that relationship in order to overcome strict compliance. The biological father in this case, as in Baby Girl S., "has grasped the opportunity to develop a relationship with his daughter and accepted responsibility for her future. To hold that even though he meets this test, he is not entitled to enjoy a parent's right to the companionship, care and custody of his child, 'an interest far more precious than any property right' (Santosky v. Kramer, 455 US 745, at 758), would violate the constitution."

This Court further adopts Surrogate Roth's position, in that "a literal construction of the statute would give an unwed mother the exclusive power to determine the future of her child without consulting the child's father by simply refusing to live with him for the last six months of her pregnancy. Most assuredly, such result deprives the unwed father of due process and equal protection when he has consistently demonstrated his dedication to his child (see discussion and cases cited in Lehr, at 256-261)."

The Court thus finds that the consent of Michael T. is required for the adoption herein; the petition for the adoption of Raquel Marie is denied.

The Court will not consider the mother's claims of fraudulent consent and subsequent revocation.

Furthermore, Respondent Michael T.'s motion for summary judgment on the ground that the subsequent marriage of the parties entitled him to retroactive "veto power" is denied.

Louise T.'s motion for visitation is moot.

The Petitioners are directed to forthwith return the child Raquel Marie to the Respondents Michael and Louise T..

This decision shall constitute the order of the Court.

Dated: May 10, 1989.

E N T E R,

/s/ Louis A Barone

HON. LOUIS A. BARONE, J.F.C.

No. 90-597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT and ANA C.,

Petitioner,

vs.

MIGUEL T. and LOUISE N.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

RESPONDENT - RAQUEL MARIE'S BRIEF IN SUPPORT

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QUESTIONS PRESENTED FOR REVIEW

In the interest of brevity, Raquel Marie ascribes to and supports the recitation of the questions presented in the Petition of her proposed adoptive parents.

LIST OF PARTIES

As required by Rule 21.1(b) an explanation is offered as to the parties to the proceeding as existed in the Court of Appeals of the State of New York. The caption of the case in this Court properly shows the prospective adoptive parents, as Petitioner, and the natural parents, as Respondents. In the Court of Appeals of the State of New York, and all lower courts, this proceeding was styled "In The Matter of Raquel Marie X".

Pursuant to Section 249(a) of the Family Court Act of the State of New York, the author of this brief was assigned by the Family Court, Westchester County, to represent Raquel Marie as her Law Guardian. In such capacity, the subject child, through her attorney, has fully participated in all phases of these proceedings, on the trial and appellate levels, and will continue to participate in this Court.

Pursuant to Section 1012 of the Civil Practice Law and Rules of the State of New York, the Attorney General of said state was given proper notice of the challenge to the constitutionality of the applicable statute. While the Attorney General did not appear or argue in the courts below on this matter, he did file a copy of a brief in a companion case in the Appellate Division, Second Department, which was accompanied by a cover letter, dated June 23, 1989, which highlighted this Court's decision eight days earlier in *Michael H.* in support of the constitutionality of said statute. Robert J. Schack, Assistant Attorney General, had articulated to the Law Guardian that the briefs of the adoptive parents and the attorney for Raquel Marie were more than adequate in defending the statute's constitutionality and, for that reason, the Attorney General chose not to file a separate brief in the Court of Appeals. However, after completion of oral arguments, at the direction of the Court of Appeals, the Attorney General did submit a copy of its cover letter to the Appellate Division and companion case brief. It is unknown whether the Attorney General will participate at this stage of the proceedings before this Court. (see Law Guardian's appendix for copy of Attorney General letter).

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OF THE STATE OF NEW YORK

RESPONDENT - RAQUEL MARIE'S BRIEF IN SUPPORT

Raquel Marie, the child who is the subject of this proceeding, files this Brief in support of the Petition of her proposed adoptive parents for a Writ of Certiorari to review the order of the Court of Appeals of the State of New York which determined that Section 111(1)(e) of the New York Domestic Relations Law violates the provisions of the United States Constitution.

OPINIONS BELOW

The Orders, Opinions and Decision below are correctly set out in the Appendix to the Petition (hereinafter "PA" with page number to be inserted as appropriate).

JURISDICTION

Raquel Marie fully supports the arguments articulated by Petitioner as to this Court's jurisdiction to review the determination of the Court of Appeals of the State of New York. Clearly, the decision below (PA-2) is a final determination by the highest court of a State which draws into question the validity of a state statute on the submitted ground of its being violative of the United States Constitution.

Regardless of the remittal of this matter to the Appellate Division, Second Department, by the Court of Appeals so as to determine the natural father's compliance with the interim, state law judicial standard which it announced (PA-18), its determination that the applicable statute is unconstitutional is a final order on the federal question and review can only be had to this Court. Notwithstanding the ultimate outcome of the state law issue in the lower courts, the invalidation of the bulk of New York's statutory scheme for adoptions on federal constitutional grounds should be reviewed by this Court due to its widespread impact and the improper reading of the prior precedents of this Court.

Accordingly, Raquel Marie subscribes to and supports the assertion in the Petition that the Court of Appeals order is a final determination pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The statute which was found unconstitutional by the Court of Appeals, Section 111(1)(e) of the New York State Domestic Relations Law, along with the relevant provisions of Section 111-a (notice requirements) are correctly set out in the Petition, at pp. 3-4.

HOW THE FEDERAL QUESTION WAS RAISED

From the commencement of the proceedings in the Family Court, Westchester County, Respondent Miguel T. has asserted his alleged ability to veto the proposed adoption on the grounds that to deny him such a right would be violative of his rights under the United States Constitution. In making this claim, Respondent Miguel T. properly served the Attorney General of the State of New York with the appropriate challenge to the constitutionality of the applicable statute. In the meanwhile, Respondent Miguel T. readily conceded that he could not literally comply with the criteria contained in Domestic Relations Law Section 111(1)(e). The Court of Appeals clearly stated in its opinion that its determination in striking down the applicable statute was made on federal, not state, constitutional grounds (PA-11).

STATEMENT OF THE CASE

Again in the interest of brevity, Raquel Marie fully subscribes to the statement of the case as provided in the Petition of her proposed adoptive parents. A careful analysis of this Court's prior precedents and other considerations will be presented in the "argument" section of this brief. A few points of emphasis only are required at this juncture.

This Court, in *Lehr v. Robertson*, reviewed the New York statutory scheme and focused on the notice requirement of Domestic Relations Law Section 111-a. Justice Stevens, in discussing sections 111(1)(e) and the notice requirement stated:

> Those procedures are designed to promote the best interests of the child, to protect the rights of interested third parties, and to ensure promptness and finality. (footnote omitted). To serve those ends, the legislation guarantees to certain people the right to veto an adoption proceeding. The mother of an illegitimate child is always within that favored class, but only certain putative fathers are included. 463 U.S. 248 at 266 (1983).

Mr. T., by virtue of his post-placement adjudication as the father and his subsequent marriage to the natural mother, became a "notice father" under *Lehr* and entitled to fully participate at a best interest hearing. He has fully accorded himself of this right during the trial held on remand from the Appellate Division, Second Department.

Several states have adhered to the notion that the primary focus of adoption statutes is the promotion of permanence and stability for children. In 1980, the New York Legislature, responding to this Court's decision in *Caban v. Mohammed*, 441 U.S. 390 (1979), enacted an easily ascertainable standard that was designed to alleviate much of the unwelcome uncertainty and anxiety that faced unwed mothers, unwed fathers, proposed adoptive parents and, certainly, the proposed adoptive child during the period immediately after *Caban*. The New York Legislature rejected a proposed bill that would have granted a veto right to unwed fathers who had shown "a significant parental interest in the child" as it would have established a vague and highly subjective test which would have engendered considerable and unnecessary litigation. Any such standard would be subject to the whims and preferences of the presiding trial judge. The statute which was enacted sought to follow the guidance of this Court in *Caban* and created a dichotomy between the adoptions of infants and the adoptions of older children. To the extent that said statute does not trample upon the constitutional rights of unwed fathers it should be upheld as promoting the clear interests of the State of New York in achieving promptness and finality in adoptions.

The decision of the Court of Appeals, in relying incorrectly upon this Court's precedents, has discarded the carefully crafted, objective test for determining whether an unwed father has made a requisite commitment to an enduring family relationship such that he would be entitled to veto the proposed adoption of his child. Instead, the Court of Appeals has returned the State of New York, unless this Court should decide otherwise, to the subjective, case-by-case analysis that the New York Legislature sought to avoid. Without question, if the Court of Appeals decision is permitted to stand, the effect on adoptions in the State of New York, and possibly many other states that would follow New York's lead, would be chilling. Proposed adoptive parents, unwilling

to risk the emotional trauma of a disrupted adoption and the enormous financial cost of extensive litigation, would be reluctant to enter into the process.

The applicable statute protected the rights of infant children such as Raquel Marie by preventing those unwed fathers who have belatedly manifested an interest in their children from interfering with the adoption of said child into a warm, stable home environment. In light of the Court of Appeals decision, unwed mothers, not desiring further involvement with abusive and violent fathers, may seek to abort their pregnancies rather than carry their children to term and provide them with permanence and stability through adoption. Abortion, not adoption, may be the only viable option for unwed mothers who seek to avoid the enormous potential for conflicts with unwed fathers under the subjective test announced by the Court of Appeals.

Raquel Marie would echo the remarks of her proposed adoptive parents in this section of their Petition as it pertains to the Court of Appeals misreading and misapplication of this Court's prior decisions. It is extremely important to note that, at the time of her placement for adoption, on July 22, 1988, Raquel Marie did not then have the benefit of an intact, or *de facto*, family relationship as defined by the decisions of this Court. The Court of Appeals seems to have totally ignored this Court's warning (by Justice Scalia) against viewing a liberty interest "in isolation from its effect upon other people." *Michael H. v. Gerald D.*, ____U.S.____, 105 L.Ed.2d 91 at 106-107, note 4 (1989). The abusive, non-caring demeanor of Raquel Marie's natural father cannot be viewed in isolation from its impact upon her frightened mother and the child herself.

The decision of the Court of Appeals also goes far beyond the approaches of many other state courts to this issue (as will be discussed in more detail) and affords a liberty interest to an unwed father who has not attempted, in any meaningful way, to establish an intact family relationship for the benefit of his child. As noted by the Appellate Division, Second Department below, the cohabitation requirement of the applicable statute - together with the other provisions - "serves the salutary purpose of ensuring that the consent of an unmarried father to an adoption will be

required where a meaningful family relationship has been established." (PA-25). Where her natural father has failed, prior to her placement for the purpose of adoption, to establish such an enduring family relationship, as contemplated by the precedents of this Court, Raquel Marie is entitled to the protection of the challenged statute which is constitutional in all respects. The right of Raquel Marie to permanence and stability in her prospective adoptive home should not be denigrated by the belated actions of her natural father who has failed to establish a "protected family unit under the historic practices of our society. . . ." *Michael H.*, 105 L.Ed.2d at 106.

The Court of Appeals did not disturb the factual findings of the lower courts in this matter which included the Appellate Division's observation that the relationship between Raquel Marie's natural parents was "tumultuous" and more specifically, her natural father was viewed as "violent". (PA-28). The Family Court noted that the relationship was "turbulent" (PA-36) and discerned a total lack of trust for and obligation to one another. In response to the Law Guardian's cross-examination, Miguel T. conceded in the Family Court that, as of the date of his marriage to Ms. N. on November 5, 1988, there was no "intact" family. (Tr. B438).[1] Clearly, a belated manifestation of interest should not be given constitutional protection and Raquel Marie is entitled to permanence and stability in her proposed adoptive home where she has resided since July 22, 1988.

THE FACTS

The case at bar is a bitterly contested adoption proceeding which was commenced in the Family Court of the State of New York, County of Westchester, in January of 1989. The object of this extensive litigation is Raquel Marie who was born on May 26, 1988 in White Plains, New York. (Tr. A17).

It should be noted that the hearing which is the subject of the present appeal was limited by the Family Court to the issue of

[1] As in all earlier briefs, all references to "Tr. A" are to pages in the transcript for April 28, 1989 and references to "Tr. B" are to those pages in the transcript for May 1, 1989 and all subsequent trial dates of the hearing on the natural father's veto right.

the natural father's consent. The Appellate Division, Second Department, reversing the Family Court on other grounds, stated that such bifurcation was an improvident exercise of the Court's discretion and that a hearing which would cover all issues (including best interests) should have been held. (PA-29). On remand, before a different trial judge, a hearing was commenced on all remaining issues (including best interests) at which the natural father has fully participated through counsel and which consumed eight full trial days until same was suspended awaiting action by the Court of Appeals.

The biological parents of Raquel Marie are Louise N. and Miguel T. (Tr. A17) who had first met in 1983 or 1984 while they were both students at Eastchester High School. (Tr. B4-5). At the time of Raquel's birth, Louise N. was 23 years old (Tr. B760) and unmarried.

Just 21 months earlier, on August 10, 1986, Ms. N. had given birth to Lauren, who was not the subject of this proceeding. (Tr. B15). This child was also fathered by Miguel T. (Tr. B5). Louise, herself, is one of seven children, the youngest of whom is only two years older than Lauren. (Tr. B554, 834-835).

Mr. T. did not graduate from high school while Ms. N. did (Tr. B4, B243) and as they dated each other it was readily acknowledged that they each also dated others. (Tr. B244). After high school, Mr. T. sought to claim that he was living with Ms. N. "part-time", actually weekends at the home of Mr. T's parents (Tr. B8), but he readily conceded that, when Louise went into labor with Lauren, the expectant mother had to be transported to the hospital from her parents' home (Tr. B9) and that is where she, and Lauren, returned after the birth. (Tr. B12).

While the Court of Appeals has ruled that, as a matter of state law, the period to scrutinize for determining whether a natural father should have a veto right is the six months preceding the placement of the subject child for the purpose of adoption, Mr. T's demeanor during Ms. N's pregnancy with Raquel, in comparison with his involvement at Lauren's birth, is instructive. While Mr. T. claimed to have participated in LaMaze classes with Ms. N. prior to Lauren's birth, and was present for the delivery

of their first child (Tr. B7-10), he took no such action with respect to Raquel. (Tr. B293). In fact, in the voluminous hospital records of Raquel's birth (Exhibit "C") there is no mention whatsoever of Mr. T. or his supposed presence at the hospital at any time. Instead, as will be further described, during Ms. N's pregnancy with Raquel, Mr. T. assaulted the expectant mother on several occasions.

The subject of marriage between Mr. T. and Ms. N. arose on numerous occasions - from 1985 until their "relationship" substantially deteriorated in mid-1987 - and each party clearly refused the other's proposals each time (Tr. B246-248) with Louise asserting that she did not "truly trust" him (Tr. B14) and Mr. T. echoed these sentiments. (Tr. B375, B747). This was not surprising given the often stormy and brutal nature of their relationship. It was not until November 5, 1988, three and one-half months after Raquel's placement for adoption, that Louise and Michael suddenly married under circumstances which have not yet been fully explored at trial. Subsequent to oral argument in the Court of Appeals, it was brought to the attention of the Court by counsel's letter of June 25, 1990, which was accepted and distributed to the judges of the Court, that the natural father and natural mother had separated previous to the oral argument due, in part, to additional incidents of violence. On information and belief, the natural father and natural mother are still living separate and apart.

Nevertheless, during a brief examination of the issue, Mr. T., responding to the Law Guardian's questions, acknowledged that his eventual marriage to Ms. N. was motivated at least in part by a desire to "help each other and get our child back" and to "*start* our lives as a family unit". (Tr. B414-emphasis added). Obviously, a "family unit" had never previously existed. Underscoring this point, Mr. T. readily conceded that, prior to November of 1988, "No, it wasn't an intact family." (Tr. B438).

In late 1986, Mr. T. and Ms. N. apparently discussed the prospect of residing together (Tr. B16) but this situation did not materialize due to supposed financial considerations. However, it is more likely that, in the course of their turbulent relationship, Ms. N. and Mr. T. did not commence living together at this

time because of their mutual lack of trust. Louise told Miguel "I don't know if I truly trust you as yet. If you can be the father of a child — the father of my child yet and to be there every day. . .". (Tr. B14).

Eventually, in April of 1987, Ms. N. and Mr. T. procured a domicile together, a small apartment in Scarsdale, New York. (Tr. B18-19). This attempt to establish an "intact family" was feeble and unsuccessful as the very next month Ms. N. alleged that Mr. T. was having a sexual involvement with the tenant next door. (Tr. B20, B881 and B375). During this time frame, Louise suffered from a case of pubic lice (Tr. B880), likely transmitted to her by Mr. T., and Miguel offered as a misguided rejoinder that he could have gotten pubic lice from Ms. N. (Tr. B274). Ms. N. readily stated that during this period of time, when they were supposedly living together, she heard repeated "rumors" that Mr. T. "had been involved with other women." (Tr. B880).

During this abbreviated attempt at living together, Mr. T. apparently impregnated Ms. N. once again (Tr. B149-150) and Ms. N. obtained an abortion without his knowledge or consent in July of 1987. On later learning of this abortion, Mr. T. became upset though he denied he was angry enough to hurt Ms. N. (Tr. B150). This effort at establishing a domicile abruptly terminated in July 1987 with Ms. N. leaving the apartment and, one week later, Mr. T. did the same. (Tr. B21). Each party then returned to the homes of their respective parents. With the exception of approximately one week after Raquel came home from the hospital, this three month experiment had been the sole (pre-placement) period of time that Mr. T. and Ms. N. lived together. In apparent retaliation for Ms. N's procuring an abortion, Mr. T. assaulted Ms. N. on July 19, 1987 at the home of her parents (Tr. B157-158). Mr. T. punched Ms. N. in the left eye and she was taken to a local hospital. An Order of Protection was issued to Ms. N. by a local criminal court (Tr. B159). The trial court, over extensive objections, permitted no further probing of any assaults by Mr. T. upon Ms. N. prior to this date. (Tr. B681-684).

In September 1987, while Ms. N. and Mr. T. were still living with their respective parents (Tr. B554-555), Ms. N., once again, was impregnated. (Tr. B556, 571-572). Ms. N. readily volunteered

to a representative of the District Attorney's Domestic Violence Unit that she had been raped by Mr. T. and that her pregnancy resulted from said act. (Tr. B687). Well before the birth of Raquel Marie, and the trial of this matter, Ms. N. also described the September 1987 incident as a rape to an Assistant District Attorney. (Tr. B692). At the hearing of this matter, Ms. N., having since joined forces with Mr. T., sought to minimize the significance of her earlier rape accusations by protesting that "I just looked at it as I'm so angry that he got me pregnant". (Tr. B687). However, Ms. N. conceded that there was a strong relationship between the July 1987 abortion and the "rape" (and pregnancy) of September 1987 - "it had something to do with what I had done previously". (Tr. B888). Despite the gloss which Ms. N. attempted to put on the September 1987 incident during her testimony, her July 1988 statement to a caseworker of Family Consultation Service of Eastchester (Joan Elkin) clearly characterized the "rape" as a pay-back by Mr. T.: "Louise claims that her most recent pregnancy was a result of Michael forcing himself on her in retaliation for the abortion". (Exhibit "K"). Said records further reflect Ms. N's statements that Mr. T. "has used and dealt cocaine and that he smokes pot."

Louise further remarked to Ms. Elkin that Mr. T. "has been with other women" and while he promises assistance with their children he, instead, "flees" and pays no attention to them. In addition, Louise also remarked to a caseworker at the Spence-Chapin Agency in June and July 1988 that Mr. T. was "unreliable, physically and verbally abusive and unfaithful to her (Louise)." (Exhibit "14").

Mr. T., now aware of Louise's pregnancy (Tr. B572) confronted Ms. N. in a local restaurant parking lot on October 31, 1987 and assaulted her once again. This incident was reported to the police. (Tr. B706-708). Consistent with Ms. N's concerted effort to downplay numerous violent altercations with Mr. T. at trial, Louise proclaimed difficulty in recalling "all these little incidences." (Tr. B707).

Several days later, on November 4, 1987, Mr. T. came to the home of Ms. N's parents in Tuckahoe at a time when Ms. N. described "hostile things (were) happening between" them.

(Tr. B630). Another violent altercation ensued (Tr. B633-634) and Louise's statement to the police revealed that Mr. T. kicked in the front door and threatened to hurt the now pregnant Ms. N. if she "brought any other men into the house." (Exhibit "I"). As a result of this incident, Ms. N. filed additional criminal charges against Mr. T., alleging that he had violated the Order of Protection which she had obtained in July of that year.

Approximately ten weeks later, on January 19, 1988, Mr. T. again forced his way into the house of Ms. N's parents - grabbed the now 5 months pregnant Louise - and left a mark on her neck. (Tr. B662-663). Ms. N. attempted to call the police for assistance but was physically prevented from doing so by Mr. T. (Tr. B667-668). On March 1, 1988, Mr. T. plead guilty to assault in the third degree (and criminal mischief 4th) in full satisfaction of all six pending charges brought against him by Ms. N. He was sentenced to three years probation and ordered to pay restitution to Ms. N.

In March of 1988, Ms. N. and her daughter, Lauren, moved from the home of her parents in Tuckahoe to an apartment in Mt. Vernon. Ms. N. located this apartment through the services of a real estate broker and utilized her own funds, and public assistance benefits, to pay all necessary charges and fees. Ms. N's relatives assisted her in moving furniture into the previously unfurnished apartment and Ms. N. purchased all remaining personal effects and necessities. (Tr. B558-565). All of this was done without the assistance, participation or involvement of Mr. T.

Later in March of 1988, having just resolved six pending criminal charges against him by Ms. N., Mr. T. vindictively dragged Ms. N. back to the Family Court seeking an order to reduce his support payments for Lauren. (Tr. B333). Two months previously, though both Mr. T. and Ms. N. sought to portray their relationship at trial as no different from any typical married couple, Ms. N. wrote to the Family Court and alleged that she had "not received any form of child support" whatsoever from Mr. T. and that she was solely supporting Lauren. (Exhibit "H"). A similar statement was made by Louise to a Department of Social Service representative when she sought public assistance benefits. (See Exhibit "G").

On February 18, 1988, Mr. T. had arranged for Ms. N. to submit to a sonogram. (Tr. B40). However, same was not obtained by Mr. T. due to any medical necessity - or fatherly concern for the well-being of the fetus - but as some type of misguided and convoluted defense to the numerous assault charges then pending against him in the local criminal court: "To show my emotions why I was, you know, getting roused up at whatever she would do." (Tr. B373). Mr. T's then and present counsel attempted to use the fact of Louise's pregnancy - with yet unborn Raquel Marie - to try and defeat the criminal charges then pending by Ms. N. (Exhibit "13"). Having assaulted the pregnant Ms. N. on several occasions, Mr. T. had obviously expressed no concern whatsoever for yet unborn Raquel Marie's medical status. Instead, Mr. T's simple motive was to avoid a jail term, which was not unlikely as a result of the alleged rape and the continuing threats and assaults upon Ms. N. during her pregnancy with Raquel.

In the midst of this stormy, tense and violent relationship, Ms. N. had mentioned on several occasions to Mr. T. the prospect of her placing the yet unborn child for adoption and Mr. T. readily acknowledged that he was aware of this possibility as early as October, 1987. (Tr. B379, 381). Nevertheless, despite Mr. T's supposed opposition to the prospect of adoption (Tr. B96-100) and the availability of able counsel, Mr. T. claimed that legally there was "nothing" he could do until after the baby was born. (Tr. B99). Obviously, if he had wanted to forestall an adoption, Mr. T. could have sought a paternity adjudication during Louise's pregnancy under Section 517(a) of the Family Court Act of the State of New York. Mr. T. did not file with the putative father registry nor did he submit a paternity petition until more than seven weeks after Raquel's birth. Prior to said filing the bulk of Mr. T's energies were directed to using the fact of the pregnancy in a purely defensive mode, seeking to defeat or defuse the then pending criminal proceedings. Mr. T's callous indifference toward the fetus and repeated assaults upon the pregnant mother underscored his lack of interest in yet unborn Raquel Marie.

After Raquel Marie's birth on May 26, 1988, she was retained in White Plains Hospital for a few additional days, allegedly for medical reasons. (Tr. B301). Ms. N. lamented that she was just too tired to deal with the baby (Tr. B757-758) but it appeared

more likely that Raquel Marie remained because Ms. N. was mulling over the prospect of adoption. In any event, Louise, Lauren and Raquel eventually returned to Ms. N's Mt. Vernon apartment. Apparently, Mr. T. stayed over at the apartment "after work" for approximately one week after Raquel's arrival (Tr. B72) but left because Mr. T. believed "it wasn't safe for me to stay there at night." (Tr. B85). Thus, at the time of the child's placement, on July 22, 1988, Mr. T. had lived with Ms. N. for a grand total of one week during the preceding one year period.

Having concluded the one week stay with Ms. N., during which Mr. T. and Ms. N. argued repeatedly (Tr. B85), Miguel soon returned to Louise's Mt. Vernon apartment on June 9, 1988 and another violent altercation ensued. It is readily apparent that this incident occurred in the presence of both Raquel and Lauren. Mr. T. complained to Ms. N. that she looked like a "slut and a whore," that her clothes were "bimbo" clothes and he proceeded to physically pull off her clothes. (Tr. B205-206). Obviously, there was no end to the stream of violence directed by Mr. T. against Ms. N., regardless of the Tuckahoe Criminal Court assault conviction, Mr. T's placement on probation and an existing permanent Order of Protection. In June of 1988, Mr. T. continued to heap physical and mental pressure upon Ms. N. and it showed no signs of subsiding. However, Mr. T., supposedly concerned about the prospect of Raquel being placed for adoption, did not commence any legal proceedings during that month or the first part of July because, according to Mr. T., he and Ms. N. "had no problems". (Tr. B304). During this period, Ms. N., finding it "hard" to deal with both small children (Tr. B714) apparently continued to sift through various adoption prospects. Ms. N's difficulty in attempting to care for two small children was certainly compounded by Mr. T's concession - in a monumental understatement - that "there were times when I wasn't there." (Tr. B90). When Mr. T. was present, which was rarely, there was palpable tension and physical abuse.

On June 20, 1988, Ms. N. decided to test Mr. T's resolve with respect to Raquel Marie's future. Ms. N. came to the residence of Mr. T's parents, dropped Lauren (22 months) and Raquel (3 1/2 weeks) at the door, spit at Mr. T. and told him "they are your kids. . .you figure out what to do with them." (Tr. B386). Neither

party had previously obtained any order of custody with respect to either child. Despite Mr. T's clear understanding that Raquel Marie might be given up for adoption, and his pondering possible legal remedies or redress, he took no self-help measure at the opportune moment. (Tr. B388).

Mr. T. failed to retain custody and control over Raquel or to immediately seek an order of temporary custody. His paramount concern, as expressed at trial, was the existence of an Order of Protection (which was entered on behalf of Ms. N. only) and not wanting "to get in any more trouble that [sic] he was already in." (Tr. B387-388). Louise testified that she had deposited both children on Mr. T's doorstep on said date because "if he wanted all the responsibility, then for him to take it." (Tr. B745). Mr. T., consistent with his prior pattern, thinking selfishly of his continuing battles with Ms. N., did not seek to exercise parental responsibility and control over Raquel so as to forestall an adoption. Ms. N. promptly retrieved both children. (Tr. B387, 744-745).

Thereafter, Louise notified Mr. T. that she was seeking to place Raquel Marie "in foster care" and he agreed because "she needed a break." (Tr. B92). Thus, three days after the incident described above, on June 23, 1988, Louise placed Raquel Marie in the Spence-Chapin Agency where she remained until July 12, 1988. (Tr. B90-96, 304-305). While both natural parents sought - at the trial of this matter - to portray this placement as a temporary, "baby-sitting" arrangement, in reality this was a prelude to the proposed adoption of this child. Despite the fact that Mr. T. was well aware of Ms. N's adoption plans - as early as October, 1987 (Tr. B379-381, 96, 286 and 388) - and knew of the Spence-Chapin placement in advance, he made no objection thereto and continued to profess that he "was always kept in the dark" about adoption. (Tr. B303). Despite his supposed concern over what Ms. N. would do with Raquel, Mr. T. never visited Raquel during the three weeks she was at Spence-Chapin and did not file any proceeding in court until July 19, 1988. (Tr. B306-307).

On July 12, 1988, after a dispute over visitation with the child, Louise retrieved Raquel from Spence-Chapin and moved in prompt fashion to finalize a private placement adoption.

(Tr. B429). Within a few days after Raquel's return from Spence-Chapin, Mr. T. arrived at Ms. N's apartment while she was on the phone with a prospective adoptive couple, Mr. & Mrs. C. At that time, Mr. T. was told by Ms. N. that she was talking to the "people who are thinking of adopting. . . a family in New Hampshire". (Tr. B430). Having known about Ms. N's plans to place Raquel for adoption as far back as October, 1987 (Tr. B379-381) - and now learning that Ms. N. was talking to specific people about the adoption - Mr. T. still did nothing for approximately one more week. (Tr. B429-432). While not being privy to numerous other conversations between Ms. N. and other prospective adoptive couples and/or their attorneys, when Mr. T. was confronted with the prospect of Ms. N. speaking to specific people about an adoption his response was to walk out of Ms. N's house. (Tr. B379).

On July 19, 1988, Mr. T. filed a petition in Family Court seeking custody of Raquel and Lauren. While Mr. T. sought to assert in the trial court that he was seeking legal recourse to prevent or forestall a possible adoption, the petition which he completed and verified makes no mention whatsoever of any possible adoption. To the contrary, Mr. T. alleged that Ms. N. was not "able to care for the children while she is working or in school" and, incredibly, that he "can provide a stable home environment." (Petition of July 19, 1988). These papers were not served upon Ms. N. until one week later, July 26, 1988.

On July 22, 1988, Ms. N. executed the documents in reference to this adoption proceeding and delivered Raquel Marie to petitioners. Said documents reflected Ms. N's intention and desire to consent to the adoption of Raquel by Mr. & Mrs. C. (Petition, PAR. 12 and Exhibit "B" thereto). In said papers, Ms. N. acknowledged that she was placing Raquel for adoption because she recognized that she would be unable to provide a good home for the baby and that Mr. & Mrs. C. would provide "a fine home with a stable family environment which is something I could not provide a child at this time." (Petition, Exhibit "B"). Raquel Marie has lived continuously with Mr. & Mrs. C. in New Hampshire from July 22, 1988 to date. The author of this Brief visited with Raquel Marie in her home on November 25, 1989, and found her to be well integrated into a warm, loving home environment.

After the placement of Raquel, Mr. T. sought to gain the assistance of Ms. N. in obtaining Raquel's return. Ms. N. resisted for several months. An order declaring Mr. T. to be the father of Raquel was made in August of 1989 in the Family Court in proceedings held without notice to Mr. & Mrs. C. (Tr. A35).

On October 1, 1988, there was another violent incident between the natural parents wherein Mr. T. pulled out clumps of Ms. N's hair. (Tr. B213-214). Three days later, Mr. T. assaulted Ms. N's good friend, Nancy L., for which he was also charged in a criminal court. In bizarre fashion, Mr. T. and Ms. N. were married on November 5, 1988 and Ms. N. then joined Mr. T's various legal efforts to gain Raquel's return. As noted previously, during the pendency of this matter in the Court of Appeals, Mr. T. assaulted Ms. N. on two separate occasions, necessitating the issuance of yet another Order of Protection, and the parties once again separated. While Mr. T. once sought and obtained counselling for his propensity for violence at the Westchester Jewish Community Center (Tr. B338) he later admitted that, despite having received therapy, incidents of violence continued. (Tr. B389).

As previously noted, Mr. T. acknowledged that his marriage to Ms. N. was motivated by their desire to "help each other and get our child back" and to "start our lives as a family unit." (Tr. B414). Without dispute, no intact family existed prior to November 5, 1988 and Mr. T. had conceded this fact. (Tr. B438). Ms. N. who had hoped to provide a better life for Raquel Marie through the adoptive placement eventually relented to unceasing pressure and joined Mr. T's efforts. Nevertheless, Ms. N. had stated to a Spence-Chapin caseworker that she was "frightened with the prospect of raising two children on her own, and . . . is frightened by the BF [birth father] who is violent". (Exhibit "14"). These proceedings ensued.[2]

REASONS WHY WRIT SHOULD BE GRANTED

So as to avoid any unnecessary repetition, Raquel Marie does fully subscribe to and support the reasons cited in her proposed

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[2] Raquel Marie fully subscribes to the statement of facts as contained in the Petition of her proposed adoptive parents.

adoptive parents' petition as to why this Court should grant review. A brief, additional statement on behalf of the child is appropriate at this point.

The substantial distortion of this Court's prior decisions by the New York Court of Appeals effectively denies to Raquel Marie, and children similarly situated, the fundamental right to permanence and stability in their lives. Raquel Marie's natural mother sought to place her for the purpose of adoption so as to afford her a chance at a warm, stable home environment. A determination by the New York Court of Appeals to accord a liberty interest to an unwed father, who has not previously established a nurturing, substantial family relationship as recognized under the historic practices of our society for the benefit of such child, will leave children such as Raquel Marie in a state of indefinite limbo and subject to substantial, emotional trauma. Children are entitled to the protection which a clear-cut, objective standard offers to determine whether their natural fathers should be accorded a veto right over any proposed adoption of such child.

Prior to this Court's decision in *Michael H. v. Gerald D.*, there was a wide divergence of approaches by various high state courts to the issue of unwed fathers' rights in newborn children. Many of these courts have struggled to interpret the precedents of this Court prior to *Michael H.* The profound disagreement between the various Justices of this Court in *Michael H.* will not provide substantial guidance for state courts and legislatures in this area. If permitted to stand unreviewed, the New York Court of Appeals decision will mark an extreme position on this issue and may likely be followed by other states. As will be addressed in the argument section of this brief, several high courts of other states have taken an adverse view to that of New York and, it is submitted, specific guidance is required from the Supreme Court on the rights of unwed fathers to veto adoptions of their newborn children so that this substantial divergence of opinions will not continue. Until such time as definitive guidance is provided by this Court it is entirely likely that a subjective standard for determining the rights of unwed fathers will lead a majority of natural mothers to ignore the prospect of adoption, fearing an uncertain process and result, and instead seek to abort the children which they are carrying. The adoption statutes of the

various states, including that of New York, should be promoted to the extent that they do not trample upon the constitutional rights of unwed fathers and, in this regard, the case presented is most significant and deserving of review.

ARGUMENT

POINT I

SECTION 111(1)(e) OF THE DOMESTIC RELATIONS LAW IS CONSTITUTIONAL IN THAT IT GIVES A VETO RIGHT TO NATURAL FATHERS WHO SATISFY THE CRITERIA PRESCRIBED THEREIN AND FULFILLS COMPELLING STATE INTERESTS INCLUDING THE ADOPTION OF ILLEGITIMATE NEWBORNS INTO STABLE ADOPTIVE FAMILIES

The New York Legislature, in enacting the amended statute during 1980, sought to follow the guidance of this Court in *Caban* so as to distinguish between the problems attendant to the adoptions of newborns as opposed to older children. 441 U.S. at 392. The statute was carefully patterned to recognize the distinction which exists between inchoate rights of a natural father, by virtue of the biological connection only, and those rights which, by his own, affirmative substantive actions, become entitled to constitutional protection. With respect to newborns, the cohabitation requirement of the statute (along with the other criteria) convincingly serves one of the State's legitimate and compelling interests in providing for the child the likelihood of two natural parents in the home. Where the unwed father has manifested his concern and commitment to the subject child, by creating an intact or *de facto* family relationship, he will be entitled to veto any proposed adoption. Where the unwed father has failed to meet these carefully drawn, objective criteria, the adoption may proceed on the consent of the unwed mother only thus also serving the State's legitimate and compelling interest in providing the prospective adoptive child with a stable and secure adoptive home and encouraging promptness, certainty and, most importantly, finality in the adoption process. *Lehr*, 463 U.S. at 266, *Matter of Female D.*, 83 A.D.2nd 933 at 935, 442 N.Y.S.2d 575

(N.Y.App.Div. 1981), *Matter of Michael Patrick C.*, 83 A.D.2d 932 at 933, 442 N.Y.S.2d 579 (N.Y.App.Div. 1981).

As this Court cogently observed in *Lehr*, citing other cases, it is the day-to-day involvement of the unwed father in the life of his child that will give rise to rights of constitutional dimension.

> "The importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the blood relationship." 463 U.S. at 261, citing *Smith v. "OFFER"*, 431 U.S. 816 at 844 (1977), quoting *Wisconsin v. Yoder*, 406 U.S. 205 at 231-233 (1972).

A proper reading of this Court's cases on the rights of unwed fathers appears to accord a liberty interest to said fathers, in their children, where they have demonstrated substantial efforts to create an intact family unit under the historic practices of our society or, with respect to older children, to develop a substantial and continuing relationship with such child. While this Court has not dealt squarely with a case involving the veto rights of unwed fathers to newborn children, it is is submitted that, as Justice Scalia made clear in *Michael H.*, after giving a careful analysis of this Court's precedents, the presence of a constitutionally protected liberty interest is dependent upon the presence of a family relationship. 105 L.Ed.2d at 106-107. Likewise, Justice Stevens, in *Michael H.*, found constitutionally protected rights to exist in "an enduring 'family' relationship". 105 L.Ed.2d at 112. Regardless of the Court of Appeals attempt to obfuscate its own interpretation of Supreme Court precedent, it is undeniable that the biological father in *Michael H.* not only lost in this Court but was denied a lower-court hearing on the visitation issue altogether. Mr. T. in this matter, has been afforded a "best interests" hearing.

The major flaw in the Court of Appeals reasoning in this matter is the inability of a natural father to maintain contact with

an unborn child. The only realistic and conceivable way to measure a natural father's commitment and concern to his unborn child is by virtue of his establishing an intact family setting for that child to live and thrive (as well as monetary support and "holding out"). To this end, the quotation provided from *Matter of Robin U.*, 106 Misc.2d 828, 435 N.Y.S.2d 659 at 662 (N.Y. Fam.Ct. 1981) is vividly on point (Petition at pp. 20-21). It would be redundant to again state the insightful analyses of this Court's leading precedents as recited in pages 20 through 25 of the Petition. Raquel Marie does fully subscribe to the treatment therein given of *Stanley V. Illinois*, 405 U.S. 645 (1972), *Quilloin v. Walcott*, 434 U.S. 246 (1978) as well as *Caban*, *Lehr* and *Michael H.* It is abundantly clear from a reading of these cases that this Court has only granted constitutionally protected rights to unwed fathers where there has been a *substantial* period of living together. Moreover, as noted earlier, this Court has previously upheld New York's statutory scheme while focusing, specifically, on the notice requirement in *Lehr.* The effort by the New York Court of Appeals to utilize *Lehr* in declaring another part of the same statutory scheme unconstitutional appears to be a contradiction on its face. Raquel Marie would also underscore the argument of her proposed adoptive parents (Petition at pp. 22-23) that there should be no distinction between "stranger" adoptions and that made by a step-parent because such a differential analysis was expressly rejected by this Court in *Lehr.* 463 U.S. at 262, footnote 19.

Furthermore, it is submitted that a careful examination of the relationship between Raquel Marie's natural father and mother is appropriate in order to determine if Mr. T. has a liberty interest in his child. Justice Scalia, in *Michael H.*, specifically rejected the notion that a father's rights are to be determined only by his biological relationship to the child. To do so would afford constitutionally protected rights to a rapist. 105 L.Ed.2d at 106-107. Mr. T's relationship with Ms. N. should properly be the focus of scrutiny (not in isolation), to the extent that - under New York's statutory criteria - it created a "unitary" family for the benefit of Raquel Marie. The violent and turbulent relationship between her natural parents, which has resulted in their separating once again, is not of the sort that this Court has

accorded historic respect in our society and should not thereby imbue Mr. T. with an absolute veto right over Raquel Marie's opportunity for adoption into a loving, stable home.

Interestingly enough, while this Court agreed in *Caban* that its ruling was limited to an older child, whose father had participated in raising to a substantial degree, four Justices, in dissent, opined that the unwed mother of a newborn should be given the exclusive right to consent to that child's adoption though this issue was not presented in the case before them.

> Such a rule. . . facilitates the interests of the adoptive parents, the child, and the public at large by streamlining the often traumatic adoption process and allowing the prompt, complete and reliable integration of the child into a satisfactory new home at as young an age as is feasible. 441 U.S. at 380-381 (and see dissent by Justice Stewart).

New York's amended statute, following the reasoning of this Court in *Caban* gave unwed fathers far greater protection then would have the dissenters above.

In an effort to add to the breadth of discussion in her adoptive parents' petition, Raquel Marie would offer herein a cross-section of the efforts made by various high state courts to tackle these issues and, in part, interpret the cases cited above. A review of this wide range of constitutional discourse should lead this Court to the conclusion that definitive guidance for state courts and legislatures is required in the area of newborns, unwed fathers and the adoption process.

The Oklahoma Supreme Court rejected the due process and equal protection challenges mounted by an unwed father of a newborn and utilized four of this Court's precedents (predates *Michael H.*) to state that a biological father was not even entitled to notice of an adoption proceeding where he had not assumed any responsibility for the support and care of the mother and child during her pregnancy or at birth. *In Re Baby Boy D.*, 742 P.2d 1059 (Okla. 1986).

The Oregon Court of Appeals held, in *In Re The Adoption of N.*, that an unwed father is not entitled to notice of an adoption proceeding even under the circumstances where he is not aware of the child's existence and is thus precluded from taking even small affirmative steps toward establishing a parental relationship. 66 Or. App. 66, 673 P2d 864 (Or.Ct.App. 1983) (citing *Stanley*, *Quilloin*, *Caban* and *Lehr*). Said court relied heavily on *Lehr*, articulating that the mere existence of the biological link between the unwed father and his child did not by itself entitle the man to constitutional protection of his parental interest.

The Supreme Court of Nebraska upheld, against a constitutional challenge, an extremely strict five day filing requirement for unwed fathers to acknowledge paternity and thus be entitled to notice of an adoption proceeding. *Shoecraft v. Catholic Social Services Bureau*, 222 Neb. 574, 385 N.W.2d 448 (Neb. 1986). Said Court stressed the interest of the mother, child and state in placing newborns as rapidly as possible with those who are able to serve as adoptive parents. This view of the strict filing requirement has been somewhat limited, but not reversed, in a subsequent Nebraska Supreme Court decision. *S.R.S. v. M.C.C.*, 225 Neb. 759, 408 N.W.2d 272 (Neb. 1987).

In contrast, the Utah Supreme Court, construing a state statute which required that an unwed father file a notice of paternity before an adoption petition or have his rights cut off, without citing a single precedent from this Court, refused to allow this requirement to defeat the father's rights where there had been deliberate, deceptive actions by the natural mother to hide the fact of the birth and to expedite the adoption filing which took place two days after the baby was born and one day before the natural father filed his paternity claim. However, a strong and well reasoned dissent roundly criticized the majority's total lack of constitutional analysis and asserted that this Court's holding in *Lehr* would have compelled a finding that no notice to the father was required. *In Re Baby Boy Doe*, 717 P.2d 686 (Utah 1986).

The Wisconsin Supreme Court found that an unwed father's negative pre-birth behavior, including criminal acts and

incarceration, could be used to justify a termination of his parental rights and freeing the child for adoption. *In Re Baby Girl K.*, 113 Wis.2d 429, 335 N.W.2d 846 (Wis. 1983), *app. dism.*, 465 U.S. 1016 (1984). Likewise, the Texas Supreme Court, stressing the important interest to be served by adoption, upheld dissimilar treatment of unwed mothers and unwed fathers so long as the natural father was given notice and the opportunity to participate in a best interest hearing. *In Re T.E.T.*, 603 S.W.2d 793 (Tex. 1980), *cert.denied*, *Oldag v. Catholic Charities*, 450 U.S. 1025 (1980). The Texas Supreme Court further noted that to give the unwed father a potential veto over a proposed adoption would give him a "powerful club with which he could substantially reduce the options available to the unmarried mother". 603 S.W.2d at 797.[3] Opposite extremes on this same issue have also been posited by the states of Delaware (favoring adoption)[4] and Virginia (favoring father's rights).[5]

In addition, sixteen states[6] have adopted the Uniform Parentage Act which is designed to generally give those fathers fitting into the category of "presumed" the right to veto a proposed adoption. In the State of California, an uproar followed the decision of that state's Supreme Court in *In Re Baby Girl M.* which sought to urge the policy goal of insuring all biological fathers an opportunity to enter into a possible custodial relationship with their children. 37 Cal.3d 65, 688 P.2d 918, 207 Cal.Rptr. 309 (Cal. 1984). In response to a groundswell of public opinion, the California Legislature amended its version of the U.P.A. to clearly provide that in any dispute between an "alleged father", who is not

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[3] The Court of Appeals of Louisiana, relying on *Lehr*, has also upheld different treatment of unwed fathers by permitting them to participate in a best interest hearing. *In Re Baby Doe*, 492 SO.2d 508 (La. Ct. App. 1986).

[4] *In Re Karen A.B.*, 513 A.2d 770 (Del. 1986).

[5] *Augusta Co. Department of Social Services v. Unnamed Mother*, 3 Va.App. 40, 348 S.E.2d 26 (Va. Ct. App. 1986).

[6] Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Montana, Nevada, New Jersey, North Dakota, Iowa, Rhode Island, Washington and Wyoming.

a "presumed father", and the prospective adoptive parents, the court shall conduct a best interests hearing to determine whether the adoption may proceed. Cal. Civ. Code Section 7017(d) (West 1983). This Court had granted certiorari in a similar case coming out of California but then later dismissed the appeal for want of a properly presented federal question. *McNamara v. County of San Diego Department of Social Services*, 488 U.S. 152 (1988).

While the above mentioned cases construe a wide variety of adoption statutes, the decision of the New York Court of Appeals, if unreviewed, would clearly stand on a far extreme of granting to unwed fathers an opportunity interest based merely upon the biological connection largely without regard to the pre-birth behavior of the unwed father. Counsel would submit that this case provides an ideal opportunity for the Court to provide definitive guidance to the various states on the federal constitutional parameters of the unwed father's consent involving newborns. The trial record in this matter does not disclose a situation where the natural mother thwarted the efforts of the natural father to establish a substantial, family relationship for the benefit of the child. Instead, the parties did not reside together because they each refused the other's marriage proposals, were involved in repeated incidences of violence and had romantic entanglements with others. Mr. T's acknowledgment that no "intact" family existed more than three months after the child's placement for adoption is compelling. (Tr. B438). Clearly, the natural parents did not form the type of "unitary" family whose relationships are entitled to historic respect in our society and thus any liberty interest which Mr. T. would have had in his child is not entitled to constitutional protection. At best, Mr. T. should be afforded the opportunity to address "best interests" and the State of New York has, unquestionably, provided him with this right as will be discussed further herein.

Raquel Marie would concur with the delineation of the compelling state interests which are promoted by the applicable statute as stated on pages 26 and 27 of her adoptive parents' Petition. Insulated to date from the litigation which has swirled about her since July 22, 1988, Raquel Marie is, in one respect, fortunate to be alive and have her case before the courts. Without question,

Robert and Ana C. have been, and remain, committed to Raquel. However, if the Court of Appeals determination is upheld, many unwed mothers, facing similar circumstances, may seek to avoid the enormous emotional trauma involved, and terminate their pregnancies. Accordingly, fewer children will be available for adoption. In turn, prospective adoptive parents, faced with a highly subjective test of determining a natural father's rights, malleable with each individual jurist, will be disinclined to enter the process in New York (and other states which might follow New York's decision).

Other societal risks from permitting this decision to stand may include: the placement of children in indefinite foster care; black marketing of children; and unwed mothers keeping unwanted children under less than desirable circumstances. A subjective test to determine an unwed father's rights will unnecessarily complicate the adoption process, adversely affect the finality of adoption decrees and cause a proliferation of litigation. Children (who are born) that are sought to be placed for adoption by unwed mothers, who genuinely desire for them to have a better future, will join Raquel Marie in a seemingly endless state of legal limbo.

The criteria of the applicable statute are reasonably designed to satisfy constitutional requirements in that the child, at an extremely young age, will either have a demonstrated commitment from his natural father, by virtue of the creation of an intact or unitary family relationship (and possibly a future with said natural father), or the avenue of an adoption into a warm, stable family environment will be unimpeded by a natural father who shirks his responsibilities or belatedly seeks to manifest his interest. The inchoate rights of the latter class of natural fathers, by virtue of the mere biological connection, should not be permitted to ripen into a constitutionally protected liberty interest. The New York Court of Appeals erred in stating that the applicable statute violated the United States Constitution. The costs to our society would be enormous if a subjective test is allowed to take hold in the State of New York and elsewhere. Unless review is afforded, promptness and finality in adoptions will become the exception rather than the rule.

POINT II

THE UNWED FATHER'S CONSTITUTIONAL RIGHTS WERE PROTECTED BY GIVING HIM NOTICE OF THE ADOPTION PROCEEDING AND THE OPPORTUNITY TO PARTICIPATE AT THE BEST INTERESTS HEARING

As noted earlier in this brief, the trial court's hearing of this matter was bifurcated and the initial phase was limited to the issue of the natural father's consent. Nevertheless, pursuant to Domestic Relations Law Section 111-a (as reproduced in relevant part at page 4 of the Petition) Mr. T. was afforded notice of the adoption proceeding and the opportunity to participate. After the remand of this matter by the Appellate Division, Second Department, to the Family Court, Mr. T., through counsel, has fully participated in eight days of the best interests hearing (also covering the natural mother's consent). As noted by this court in *Lehr*, upholding the constitutionality of Section 111-a, said statute automatically provides notice to several categories of unwed fathers who are likely to have assumed a certain degree of responsibility for the care of their children. 463 U.S. at 263. It is submitted that an unwed father's ability to partake in a "best interests" hearing, enabling him to possibly show why the adoption should not proceed, satisfies constitutional requirements.

In *Quilloin*, this Court confronted a Georgia statute that required an unwed father to be legitimated in order to be able to veto an adoption proceeding. The unwed father waited eleven years to file such a petition and Justice Marshall, writing for the unanimous Court, determined that applying the "best interest of the child" standard to the legitimation hearing satisfactorily protected the unwed father's rights. His application for legitimation under Georgia law was thus denied and the adoption was finalized. 434 U.S. 246 at 254.

The appropriate analysis should be whether Mr. T. has been given due process of law before his rights to Raquel Marie may be terminated. Certainly, this issue has not finally been determined as the "best interests" hearing has been held in abeyance

pending a final ruling on the consent issue. However, as Justice White observed in *Michael H.*:

> "The emphasis of the Due Process Clause is on 'process.' (citing *Moore v. East Cleveland*, 431 U.S. 494 at 542 (1977) (White, J., dissenting)... "A fundamental requirement of due process is 'the opportunity to be heard.' (citing *Grannis v. Ordean*, 234 U.S. 385 at 394 (1914)). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner". (citing *Armstrong v. Manzo*, 380 U.S. 545 at 552 (1965)). *Michael H.*, 105 L.Ed.2d at 130B.

Raquel Marie would argue that her father, while not having a veto right over her proposed adoption - as he did not satisfy New York's prescribed statutory criteria - has been, and will be, afforded a meaningful opportunity to participate in her "best interests" hearing. His due process rights under the United States Constitution are thus sufficiently protected. As shown earlier in this brief, the states of Texas, California and Louisiana (for example) have determined that an unwed father's participation in a "best interests" hearing will usually satisfy federal constitutional requirements.

In *Caban*, Justice Stewart, as one of four dissenters, opined that New York's predecessor statute was not unconstitutional in that it afforded to certain unwed fathers the notice provision cited above and the ability to participate in the ultimate hearing on best interests as part of the adoption proceeding.

> ....an unwed father who has an established relationship with his illegitimate child is not denied the opportunity to participate in the adoption proceeding. His relationship with the child will be terminated through adoption only if a court determines that adoption will serve the child's best interest. The distinctions [between the consent provision and the notice provision] represent, I think, a careful accommodation of competing interests at stake and bear a close and substantial relationship to the State's goal of

> promoting the welfare of children. In my view, the Constitution requires no more. 441 U.S. at 395.

The notice provision of Section 111-a remains basically intact after *Caban* and, following Justice Stewart's analysis, Mr. T's failure to qualify as having an absolute veto right would still leave him with the full panoply of constitutional protections afforded by the statutory right to participate at the "best interests" hearing.

The Court of Appeals determined in this matter that, regardless of the extent and nature of the unwed father's commitment to the natural mother and child, the unwed father may insist upon an absolute veto right over any proposed adoption due to his "opportunity interest". None of the precedents of this Court has ever conferred such an absolute right upon an unwed father of a newborn child. Instead, as Justice Stevens noted in his separate opinion in *Michael H.*, with regard to the issue of visitation therein, the constitutional rights of unwed fathers may be met by an opportunity to participate in a "best interest" hearing. 105 L.Ed.2d at 112. Clearly, the notice provisions of New York's statutory scheme for adoptions provides Mr. T. with that very opportunity and should be upheld under the United States Constitution.

The inchoate opportunity rights of an abusive, unwed father should not be exalted over the right of the child to have her future determined in accordance with her best interests.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated: White Plains, New York
October 31, 1990

Respectfully submitted,

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APPENDIX

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June 23, 1989

Hon. Martin H. Brownstein
Clerk of the Court
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Re: *Matter of Raquel Marie*

Dear Mr. Brownstein:

The appeal herein is calendared for oral argument on June 27, 1989, at the same time as *Matter of Alphonse Fanelli*. Pursuant to the trial court's request, the Attorney General intervened in defense of the constitutionality of Paragraph e of Subdivision 1 of Section 111 of the Domestic Relations Law in that case and has accordingly filed a brief and will argue orally on the appeal. The Attorney General was not a party below in this case and only today received respondent's brief herein, which raises a similar challenge to the constitutionality of that statute. Under the circumstances, we do not intend to file a brief or to argue on this appeal, but instead ask the Court to accept this letter, which hereby incorporates our arguments in *Fanelli*, in defense of the statute's constitutionality.

In addition to the arguments we made in Point II of our brief in *Fanelli*, we add reference to the decision of the United States Supreme Court on June 15th in *Michael H. v. Gerald D.*, ____ U.S. ____, 57 L.W. 4691, 4694 n. 3, which we believe establishes that respondent's voluntary participation in the decision not to establish a "household of unmarried parents and their children" is fatal to any claim he might have had to substantive due process

rights as an unwed father under the statute. We also distinguish the decision in *Matter of Baby Girl S.*, 141 Misc. 2d 905 (Surr. Ct., N.Y. County 1988), *aff'd without opinion*, ____ A.D.2d ____ (1st Dep't 1989), because the respondent's voluntary decision not to live with the child or her mother, as required by the statute makes inapplicable here the *Baby Girl S.* trial court's reading of the statute to excuse a natural father's compliance with that requirement when the father is prevented, without fault or complicity of his own, from complying.

We also point out that the constitutional issue may be avoided if the Court holds that the marriage of the respondent affords him rights pursuant to Subidivision 1 of Section 24 and Paragraph b of Subdivision 1 of Section 111 of the Domestic Relations Law.

We are sending copies of this letter and our *Fanelli* brief to the parties on this appeal by Express Mail today.

Very truly yours,

s/s Robert J. Schack

Robert J. Schack
Assistant Attorney General

(3)

No. 90-597

In The

Supreme Court of the United States

October Term, 1990

ROBERT and ANA C.,

Petitioners,

vs.

MIGUEL and LOUISE T.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is New York's Domestic Relations Law Sec. 111(1)(e), which denies parental rights to an unwed father solely on the basis of the father's failure to cohabit with the mother, violative of the Due Process and Equal Protection Clauses of the 14th Amendment to the United States Constitution?

The order sought to be reviewed, relying on decisions of this Court of the past twenty years, answered the question in the affirmative.

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No. 90-597

In The

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Miguel T. and Louise T., are husband and wife and are the natural parents of a child, Raquel Marie, whose adoption was sought by Petitioners. They respectfully submit this brief in opposition to the Petition for a Writ of Certiorari ("the petition").

IDENTITY OF THE PARTIES

Respondents have been married to each other since November 5, 1988. In addition to the child that is the subject of this case, respondents have an older child, Lauren T., born to them in August of 1986. The adoption proceeding underlying this case commenced on January

3, 1989. At each point in the proceedings below, Respondents were clearly identified as husband and wife (e.g., "Mr. and Mrs. T.", "Miguel T. and Louise T.").[1] In this Court, for reasons that will become apparent below, Petitioners and the Law Guardian have intentionally misidentified respondents as "Miguel T. and Louise *N*".

In addition, the Court of Appeals' decision herein involved not only this case, but the case of "Matter of Baby S.", which presented the identical constitutional issue. See Petitioner's Appendix ("App."), at A-2, A-4, A-19. As will be discussed in the "Argument" portion of this brief (Point II), in determining whether to grant certiorari, this Court must consider also the facts in that case, for they are an integral part of the Court of Appeals' *ratio decidendi*.

JURISDICTION OF THIS COURT

Respondents respectfully submit this Court has no jurisdiction to grant certiorari as the order sought to be

[1] Indeed, prior to the commencement of the hearing in Family Court, Respondent Miguel T. moved for summary judgment dismissing the adoption proceedings on the ground that his marriage to the natural mother prior to the filing of the adoption petition rendered the child "born in wedlock" under New York's Domestic Relations Law Sec. 24(1). As the "legitimate" father of the child, Respondent argued, his consent was absolutely required under Domestic Relations Law Sec. 111(1)(b). This contention was rejected and the case proceeded on the basis of Respondent's status as the natural father of a child born "out of wedlock". Respondent raised the issue in both the Appellate Division and the Court of Appeals, where it was likewise rejected.

reviewed is not "final" within the meaning of Title 28 U.S.C. Sec. 1257. Petitioners' jurisdictional assertions (Pet. at 2-3) contain serious misstatements of both law and fact, thus compelling Respondents to address this issue at length.

Discussion

Petitioners first assert that the Court of Appeals has "construct[ed] an interim state law standard for measuring whether unwed fathers of newborn infants should be afforded an absolute veto over adoptions." Pet. at 2. Next, Petitioners contend that "the factual determination" the Appellate Division is to make as to whether Respondent Miguel T. meets the requirements of the interim "state law" standard is a question of state law. *Ibid.* From these assertions, Petitioners conclude that the "federal issue" has been finally decided by the Court of Appeals' decision and that this petition is the only opportunity they have to raise it before this Court, "whatever the ultimate outcome of the case". Ibid, at 2-3.

Petitioners are plainly wrong. First, the Court of Appeals has not constructed a *state* standard for determining the rights of unwed fathers. Quite to the contrary, the Court pointedly states in its decision that *the standard is the one established by the decisions of this Court* "which define an unwed father's right to a continued parental relationship by his manifestation of parental responsibility." App. at 18. Thus, the Appellate Division's determination as to whether Miguel T. meets that federal constitutional criteria is, *a priori*, a federal question. *Strickland v. Washington*, 466 U.S. 668, 698 (1984); *Jackson*

v. Virginia, 443 U.S. 307 (1979); *Miller v. California*, 413 U.S. 15, 25 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-286 (1964). That being so, the party adversely affected by that determination may continue to assert the federal question. Accordingly, this case does not fall within that narrow class of cases where finality was found under less than final circumstances. See, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-478 (footnote omitted):

> In most, if not all, of the cases [where finality was found in spite of contemplated further proceedings] these additional proceedings would not require the decision of other federal questions that might also require review by this Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice.

Moreover, a decision by this Court now will not end this litigation, for there are several other issues in the case concerning Respondent *Louise T.*'s rights that will be completely unaffected by this Court's action and yet determine the final outcome of the case.[2] Cf. *Cox Broadcasting, supra*, 420 U.S. at 486: "[I]f we now hold that [the state court erroneously ruled on the federal question], this litigation ends."

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[2] Most notable among the unresolved issues is the question of whether Respondent Louise T.'s consent was obtained in conformity with New York law. See the Appellate Division's decision, App. at A-29. A hearing on this and other issues commenced in November 1989, but when the Court of Appeals accepted Respondent Miguel T.'s appeal, it was discontinued and it has been held in abeyance pending a final resolution of Respondent Miguel T.'s rights.

Petitioners also assert that even if they are ultimately successful in the Appellate Division on what they have labeled "state law grounds", the federal issue, as they see it, "will be mooted and Petitioners, as well as adoptive parents similarly situated, the State and other interested persons will be deprived of any opportunity to have the federal issue reviewed here – an extreme hardship given the invalidity of an entire statutory scheme". Pet. at 2-3. This lament is specious for several reasons.

First, Petitioners, as *residents of the State of New Hampshire*, never had, nor do they now have, an interest in New York "statutory schemes" beyond the direct and immediate effect that law may have on the outcome of this case. Indeed, it is quite fanciful for them to assert concern over what they suggest is the "unsettled" state of the law in New York in the face of their initial refusal to submit to the jurisdiction of the New York courts.[3] Since

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[3] As Petitioners note (Pet. at 15), within *days* of discovering that Louise had given his child to Petitioners, Miguel brought on a writ of habeas corpus in New York State Supreme Court. What Petitioners fail to note, however, is that in opposing the writ they challenged the jurisdiction of the New York courts, arguing that since the child was in New Hampshire only the courts of that state could determine its custody. Thus, after the writ was denied on other grounds – the court pointedly rejecting their jurisdictional argument – Petitioners filed their adoption petition in the State of New Hampshire in November of 1988. It was only after that court, in a written communication to Petitioners' New Hampshire counsel, indicated it was dismissing the adoption petition, and only after Respondent Miguel filed a custody petition in New York, that Petitioners finally agreed to submit to New York law.

Petitioners concede at the outset that the Court of Appeals' invalidation of the statute may have no effect on the ultimate disposition of the case, – because they may prevail in any event – they are hardly in a position to claim hardship if this Court declines review.

Secondly, Petitioners assert that "adoptive parents similarly situated" will suffer some deprivation unless this Court acts now. The short answer to that claim is that any deprivation suffered by potential adoptive parents generally does not flow from the Court of Appeals' decision in this case but from the constitutional principles established by this Court during the past twenty years. Moreover, the "deprivation", if such it is, is limited to recognition of, and adherence to, the rights of the fathers as well as of the mothers of the children they wish to adopt. As one commentary recently put it, in describing the effects of the Court of Appeals' decision in this case "It is no longer safe for [adoption] attorney[s] to 'blink' at the unwed father's rights." Carrieri and Meyer, "Avoiding Pitfalls in Private Adoptions", New York Law Journal, November 2, 1990, p. 1, col. 1, p. 4, col. 3.

RESPONDENT'S STATEMENT OF THE CASE

Because of the page limitation applicable to Respondent's briefs, we refrain from setting forth a detailed statement of the facts in this case. Instead, we recite verbatim the findings of fact rendered by the hearing court, which are reproduced in the appendix to the petition at A-32 through A-35. Significantly, those findings

were not disturbed on appeal, either in the Appellate Division or in the Court of Appeals:

"Certain issues of fact have been conceded by all parties:

1. Louise N.T. and Miguel T. are the biological parents of the child Raquel Marie.

2. At the time of the child's birth Louise N. and Miguel T. were not married.

3. The child Raquel Marie was born on May 26, 1988.

4. Louise N. and Miguel T. while unmarried, were the biological parents of a child Lauren born August 10, 1986.

5. Raquel Marie was placed with the adoptive parents Robert and Ana C. on July 22, 1988.

6. Louise N. and Miguel T. were subsequently married on November 4, 1988.

* * *

Miguel T. (hereinafter referred to as Michael T.) testified that he and Louise had an off again/on again relationship for several years. They met in high school and dated during 1984 and 1985. In the Fall of 1985, Louise became pregnant with the child Lauren. During this pregnancy, Louise sometimes lived at his parents' home and at her parents' home. They took Lamaze classes together to prepare for the baby, he drove her to the hospital on her due date and was present during the actual birth of the child. Lauren was born on August 10, 1986. He testified that they discussed marriage but Louise stated she didn't trust him enough to marry him. In her direct testimony, Louise N. confirmed Michael's statements.

In the Spring of 1987, Louise, Michael and Lauren moved into an apartment at 84 Dunwoodie ~~Street in Scarsdale~~, New York. The three lived together until Louise moved out in or about August, 1987. At that point she went to live with her parents and he lived with his parents.

In October, 1987 Louise was complaining of back pains. Michael testified he made arrangements at a clinic called DOCS on Central Avenue, Yonkers, New York for Louise to be examined. He brought her for the examination and paid for same. It was as a result of that examination that they learned Louise was pregnant with the subject child.

Both Louise and Michael testified that in January or February, 1988 Michael made an appointment with Dr. Joan Adams, a gynecologist, to examine Louise and Michael paid for same.

On February 15, 1988 he called St. Agnes Hospital to arrange for a sonogram which was taken on February 18, 1988. Michael testified he paid $165.00 for said test.

In March of 1988, Michael bought a glider for Louise costing $310.00. Louise was complaining of back aches and had told him about this chair that eased her pain.

Because the private gynecologist was too expensive, Michael arranged for Louise to have her prenatal care at the St. Agnes Clinic. The total cost for same was $850.00. Michael testified that in June, 1988 he reimbursed Louise the $850.00 she expended for medical care.

He further testified that after the child was born, he provided formula and diapers and whatever else Louise needed for the child.

* * *

Louise and Michael both learned of the pregnancy in October, 1987. Michael testified that in November, 1987 he, Louise and Lauren had Thanksgiving Dinner with the Licata family. During the dinner he advised his hosts that Louise was pregnant and he was the father. In December, 1987 they had Christmas Dinner with the DeLillo family and advised them of Louise's pregnancy.

In January, 1988 during a criminal proceeding Michael, through counsel, advised the Court that he was the father of Louise's unborn child.

Both testified that after the birth of the child, Louise brought both children (Lauren and Raquel) to baseball games in which Michael was a participant. On each occasion, Michael held the child and advised his friends and teammates that Raquel was his new daughter.

Michael testified that prior to the birth of Raquel, Louise had mentioned placing the child for adoption. He told her he would never agree to same. Furthermore, if she could not handle the children he would take both.

Sometime in June, 1988 Louise had placed the child with the Spence-Chapin Agency. The child was there for some 20 days. On July 12, 1988 Louise had gone to Spence-Chapin to visit the child and was informed the child was not available. Raquel had been brought to a doctor for an examination. After demanding the return of the child, Louise called Michael to come to the agency. Upon his arrival, he too demanded the return of the child. Within a period of time thereafter, Louise, Michael and Raquel left the agency together.

On July 19, 1988, after the birth of Raquel, Michael T. filed a paternity petition and a custody petition in the New Rochelle Family Court on behalf of Raquel wherein he named Louise N. as Respondent.

The Court records indicate that the petitions were personally served on Louise on July 25, 1988, three days after the child was surrendered by Louise. On August, 16, 1988 Louise N. appeared before the Family Court in New Rochelle with Michael T. and his attorney Dominick Porco, Esq., Louise N. waived counsel and bloodtest admitted Michael T. was the father of Raquel, consented to the entry of an order of filiation and requested no support. An order of filiation was entered by the Court on August 19, 1988. The custody petition filed on July 19, 1988 was subsequently withdrawn by Michael T. on January 5, 1989 subsequent to the marriage of the parties which took place on November 4, 1988.

Both Louise and Michael acknowledge that Michael's name does not appear on Raquel's birth certificate. However, both testified that after the birth of the child, Michael visited at the hospital and came at those special times reserved only for fathers so that he could feed Raquel."

SUMMARY OF THE ARGUMENT

The Court of Appeals' decision in this case is entirely consistent with, indeed mandated by, the prior decisions of this Court on the issue of parental rights of unwed

fathers. The decision is in complete conformity with decisions of sister states construing the principles enunciated by this Court.

Because the decision simply brings New York's statutory scheme in line with the mandate of prior decisions of this Court, there is nothing novel about the decision.

REASONS FOR DENYING THE WRIT

I. NONE OF THE CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI IS APPLICABLE

Certiorari jurisdiction is exercised only when there are "special and important reasons therefor." Sup. Ct. Rule 10.1. None exist in this case.

As the Court of Appeals itself made clear in its decision, the ruling herein was mandated by decisions of this Court over the past twenty years. "Thus, it is plain that within two decades the interest of unwed fathers in a relationship with their children has gained significant recognition in the law, and the dimensions of that interest are by now well defined." App. at A-10. Thus, not only is there no conflict between this decision and prior decisions of this Court, a necessary pre-requisite in certiorari review under Rule 10.1(c), the ruling brings the law of New York into conformity with the constitutional principles enunciated by this Court.

The invalidated statute, Sec. 111(1)(e) contained a provisions that required the natural father to cohabit with the mother for a definite period as a condition precedent

for granting the father parental rights to his child. This requirement appears in the law of only one other state, but only in the disjunctive (see App. at A-17, n.3), and no prior decision of this Court has ever made the relationship between the parents the factor defining the parental rights of the father.

Petitioners would have this Court begin all over again in this area of constitutional law by applying Justice Scalia's analytical approach to novel Due Process claims, as set forth in "Footnote 6" in *Michael H. v. Gerald D.*, ___ U.S. ___, 105 L.Ed.2d 91 (1989). However, the rights of unwed fathers are, as the Court of Appeals noted, "by now well defined" and have been elevated to constitutional stature by the prior decisions of this Court. It is, therefore, too late in the day to apply Justice Scalia's "societal tradition" test to this well-settled area of constitutional law.[4]

But even if the question is posed as Petitioners frame it, by paraphrasing Justice Scalia (Pet. at 25), "whether the relationship between persons in the situation of Miguel and Louise has been treated as a protected family unit under the historic practices of our society", the

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[4] It is ironic, indeed, that before this Court Petitioners place such reliance on *Michael H.*, when, as Respondents in the Court of Appeals, they said this:

> Appellant condemns the Appellate Division for not referring to *Michael H.* Even apart from the fact that the decision does not help him, he neglects to mention, as the Appellate Division did at oral argument, *that Michael H. had nothing to do with any adoption.*

Brief to the Court of Appeals, p. 60, n.46.

answer is a resounding "Yes" for two significant reasons. First, the relationship between Miguel and Louise has been one of long-standing, even if at times turbulent.[5] Indeed, they have an older child, Lauren, now four years old, whom they have raised together even if not always under the same roof. Second, they are husband and wife and have been since but a few months after the birth of their second child, Raquel, the subject of this litigation.

Thus, in every sense of the words they constitute the "traditionally protected family unit" Justice Scalia spoke of in *Michael H.*

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[5] As they have attempted to do throughout this litigation, in this Court Petitioners distort the nature of Respondents' relationship. Their efforts in that regard go so far as to refer to Respondent Louise T. as "Ms. N.". This of course, is done to camouflage Respondents' status as husband and wife, a fact Petitioners' merely note in passing. More disturbing, however, is Petitioners' repeated allegation that the child who is the subject of this litigation was a product of rape. See Pet. at 25, n.3. Rather than have this Court waste its precious time reading a detailed rebuttal of this accusation, Respondents merely note that a *unanimous* Court of Appeals, in a decision authored by its only woman member, never once makes reference to that allegation. We note further that the hearing court, before whom Louise was extensively examined on this issue, failed to mention it in its factual findings.

No less than *Fourteen jurists* have been involved with this case and *not one has questioned Respondent Miguel T.'s fitness as a parent.*

II DECISIONS OF THIS COURT DURING PAST TWENTY YEARS HAVE FIRMLY ESTABLISHED THE PARENTAL DUE PROCESS AND EQUAL PROTECTION RIGHTS OF UNWED FATHERS. THE ORDER SOUGHT TO BE REVIEWED WAS COMPELLED BY THOSE DECISIONS SINCE THE INVALIDATED STATUTE WAS IN CONFLICT THEREWITH AND WITH THE LAW OF OTHER STATES.

In five cases, *Stanley v. Illinois*, 404 U.S. 645 (1972), *Quillon v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Lehr v. Robertson*, 463 U.S. 248 (1983) and *Michael H. v. Gerald D., supra*, this Court has established and reaffirmed the principle that unwed fathers who make reasonable attempts, to the best of their ability, to establish a relationship with their children are entitled to parental rights afforded all other parents, including the right to consent to the adoption of their children. On the basis of that precedent and of decisions of sister states construing it, the New York Court of Appeals held in this case that an unwed father who timely demonstrates a willingness to accept the responsibilities of parenthood should be given the opportunity to do so:

> Consequently, in an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child.

App. at A-12, citing *In Re Adoption of B.G.S.*, 566 So.2d 545 (La. 1990) and *In re Baby Girl Eason*, 257 Ga. 292, 358 S.E.2d 459 (1987).

The Court held further that the opportunity of the unwed father to establish a parental relationship with his child may not be impeded by state-imposed conditions having no rational connection to that goal:

> The living together requirement can easily be used to block the father's rights. But even more significantly, it permits adoption despite the father's prompt objection even when he wishes to form or actually has attempted to form a relationship with the infant that would satisfy the State as substantial, continuous and meaningful by any other standard.
>
> * * *
>
> Although the state plainly has a significant interest in fostering the well-being of the child by insuring swift, permanent placement, the State's objective cannot be constitutionally accomplished at the sacrifice of the father's protected interest by imposing a test so incidentally related to the father-child relationship as this one, directed as it is, principally to the father-mother relationship.

App. at A-15-16 (Citations omitted)

Clearly, there is nothing novel about this conclusion since it was pre-ordained by the decisions of this Court. The Court of Appeals would have been hard-pressed to go any other way.

Consider the facts in *Matter of Baby S.* There, from the moment he learned he was to be a father, Gustavo made every effort, legal and otherwise, to assert his interest in the child. He asserted his paternity even before the child was born, he offered to marry the mother only to have the offer rejected, and, after birth filed a paternity and custody petition. His efforts were initially thwarted by the

mother, her attorney and the adoptive parents, all of whom conspired to deny his existence to the court before which they filed the adoption petition. "In her concluding testimony [the mother] stated 'we hoped he, Gustavo, would not get wind of the whole scheme.' " *Matter of Baby S.*, supra, 535 N.Y.S.2d at 680. When, through sheer persistence, Gustavo learned of the adoption proceeding, he objected, asserting his parental rights.

These facts notwithstanding, according to Petitioner's view and the now-invalidated statute, Gustavo had no right to consent to the adoption of his daughter, and could be ignored in the entire proceeding, for no reason other than the fact that he had not cohabited with the mother for six months prior to the child's surrender.[6] Obviously, the Court of Appeals could not permit such a cruel and unusual result in the face of the decisions from this Court.

CONCLUSION

The Court has no jurisdiction as the order sought to be reviewed is not final within the meaning of 28 U.S.C. Sec. 1257. In any event, Petitioners present for the Court's

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[6] Petitioners suggest that by affording fathers the right to participate in a best-interest hearing, New York's statutory scheme grants all that is required under the Due Process and Equal Protection Clauses of the 14th Amendment. What they fail to advise this Court, however, is that under New York law participation in a best interest hearing affords the father no "substantive right he does not otherwise possess". *Matter of Male F.*, 97 Misc. 2d 505, 411 N.Y.S.2d 982 (1978)

consideration issues that have been decided by this Court over twenty years. The case does not merit the attention of the nation's highest court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 90-597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT and ANA C.,

Petitioners,

vs.

MIGUEL T. and LOUISE N.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Robert and Ana C. respectfully submit this reply Brief in further support of their Petition for a Writ of Certiorari. The purpose of this Brief is to address certain allegations made by Respondents Miguel T. and Louise N. in their opposition brief. ("Resp. Br.").

THE JURISDICTION OF THIS COURT

Respondents suggest that the Court of Appeals below, in the wake of its invalidation of Domestic Relations Law, §111 (1) (e), constructed a new *federal* criteria for measuring whether Respondent Miguel T. has the right to veto this adoption. From

this premise, Respondents argue that the order below is not final. Respondents are mistaken.

The Court of Appeals wrote that the task of "[e]stablishing a proper substitute is of course the prerogative of the Legislature, not the courts." (A-18). Because of the need to decide cases pending action by the Legislature, the Court of Appeals constructed an interim standard, which it recognized might ultimately be displaced by different legislative criteria. Indeed, the Court of Appeals took pains to "underscore that we are not prescribing necessary or even appropriate elements for any new statute, or speculating as to its constitutionality." (A-18, 76 N.Y.2d 387, 407-408, 559 N.Y.S.2d at 864-865).

Manifestly, the new standard is a matter of state law and was viewed as such by the Court of Appeals. The interim standard is to govern in New York pending action by the New York State Legislature; state legislatures write state law. That the Court of Appeals professed, in writing a new state standard, to be "guided by principles gleaned" from this Court's prior decisions does not transmute the question into one of federal law.

As the Law Guardian demonstrated in his Brief, the several states have taken varied approaches in writing legislation in response to this Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979) and *Lehr v. Robertson*, 463 U.S. 248 (1983). That such legislation was drafted in response to this Court's interpretations of federal constitutional questions does not convert each individual application of statute to facts into a federal case. The federal issue is whether the governing state statute comports with the federal Constitution. That question was raised in this case and has been finally decided by the Court of Appeals.

Respondents argue that Petitioners, as New Hampshire residents, have no interest in whether governing New York law has been correctly held unconstitutional. Yet, Petitioners, at the earliest stage of the matter, agreed to the application of New York law and, indeed, withdrew proceedings in New Hampshire

in deference to New York courts[1] and New York law.[2] As the Law Guardian notes in his Brief (p.ii), the Attorney General of New York has relied upon Petitioners' advocacy of the constitutionality of the statute. In any event, Petitioners undeniably have an interest in the proper construction and application of the federal Constitution. Respondents' contention that Petitioners "are hardly in a position to claim hardship if this Court declines review" (Resp. Br., p. 6) is strained. Petitioners, based on the error of the Court below, stand to lose their daughter — a child who they, and they alone, have raised for the past two and one-half years. It is their family that stands to be destroyed by force of error of law.[3]

The decision of the Court of Appeals below has ramifications beyond this single case. It directly impacts upon thousands of adoptions in New York State alone. As Associate Dean Joan Wexler of Brooklyn Law School reported on the day of the decision: "What we now have is an opportunity for chaos." Kolbert,

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[1] At no time did Petitioners ever object to the jurisdiction of the New York courts. In the *habeas corpus* proceeding referred to by Respondents (Resp. Br., p.5 n.3), Petitioners were never served with any papers. Papers were served upon a New Hampshire attorney and it was the attorney who objected to jurisdiction over him.

[2] The record is clear that the New Hampshire proceedings were withdrawn voluntarily. The New Hampshire court did not dismiss the proceedings; indeed the New Hampshire court had scheduled several days of hearings.

[3] Respondents carefully refrain from advising this Court that, on the eve of the Court of Appeals' decision, they fought and separated. Respondent Louise N. filed charges against Miguel T.; Respondents have not disclosed the disposition of such proceedings.

Louise N. was properly referred to by her pre-marriage name in the caption herein since: (a) she signed the adoption papers in that name; (b) she was identified in the adoption petition by that name; (c) she was referred to in the trial court's opinion by that name; and (d) her brief, violent marriage has all but terminated.

Moreover, even the Court of Appeals agreed that the "marriage" was irrelevant to these proceedings — a holding that Miguel T. has not attempted to challenge by cross-petition.

"Fathers' Rights On Adoption Are Expanded", *New York Times*, July 11, 1990, at B1, B4. That chaos can be avoided only by this Court's review of the matter; the Court of Appeals has finally determined the statute's unconstitutionality and will not consider that point again. Additionally, as the Law Guardian has written in his Brief, the decision below will also be influential in courts in other states as well.

It is suggested that the decision below will render it unsafe for attorneys to "blink at the unwed father's rights". (Resp. Br., p. 6). The Court of Appeals likewise contended below that the statute "can easily be used to block the father's rights". (A-15, 76 N.Y.2d at 405-406, 559 N.Y.S.2d at 863). These assertions beg the real question: what are the unwed father's "rights" as respects a newborn placed for adoption? That question has never been considered by this Court and merits review.

REPLY STATEMENT OF THE CASE

Respondents rely exclusively upon the statement of facts set forth in the opinion of the trial Court. It is asserted that the trial Court's factual findings "were not disturbed on appeal, either in the Appellate Division or in the Court of Appeals" (Resp. Br., p. 7). That claim is erroneous.

The Court of Appeals relied upon the facts as found by the Appellate Division, stating that the facts "have been developed at length elsewhere" and citing to the Appellate Division decision below. (A-3; 76 N.Y.2d at 394, 559 N.Y.S.2d at 856). The Appellate Division, in turn, found only that the Family Court had "accurately characterized" the natural parents' relationship as "turbulent, marred by mutual suspicion as well as assaultive behavior on the natural father's part, and neither normal nor stable. (A-24; 150 A.D.2d at 26, 545 N.Y.S.2d at 381). It rejected the other factual findings made by the Family Court. The appellate Division stated that: "Turning to the facts of the instant case, we conclude, *contrary to the findings of the Family Court*, that the natural father has fallen far short of demonstrating that he took meaningful steps to establish a family unit." (A-27; 150 A.D.2d at 28; 545 N.Y.S.2d at 382) (Emphasis added). Moreover,

a comparison of the opinions reflects that the Appellate Division stated facts not set forth in the Family Court opinion and did not adopt "facts" stated in the Family Court opinion.[4]

Respondents claim that the rape reported by Louise N. should be disregarded by this Court, since the Court of Appeals made no reference to it. (Resp. Br., p. 13, n.5). Yet, the fact is that the rape was duly noted by the Appellate Division. The Court of Appeals disregarded it, for purposes of its constitutional analysis, in the belief that the relationship between unwed father and unwed mother is constitutionally irrelevant (A-15; 76 N.Y.2d at 405, 559 N.Y.S.2d at 863).

The claim that Miguel T.'s parental fitness has not been questioned is bizarre, given the undisputed facts of the case as well as the legal context. Miguel T. wishes to block this adoption by obtaining an adjudication that he should have an absolute veto right — a veto right which would cut-off and prevent any consideration of his parental fitness. The Family Court bifurcated the hearing, limited the issue to the claim for veto rights, and refused to consider "best interests" or fitness evidence, a course of procedure found improper by the Appellate Division. (A-29; 545 N.Y.S.2d at 383-384).[5]

REASONS FOR GRANTING THE WRIT

Respondents argue that the writ should be denied because the governing constitutional issues are "well-defined" and it is "too late in the day" to apply Justice Scalia's analysis, as articulated in *Michael H. v. Gerald D.*, ____ U.S. ____, 109 S.Ct.

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[4] For example, the Appellate Division referred to the infidelity of Miguel T., the abortion procured by the biological mother, the rape as to this pregnancy, and Miguel T.'s fears of the biological mother. (A-22, A-23). None of these matters were addressed in the Family Court opinion. On the other hand, much of the "facts" set forth in the Family Court opinion were not referred to by the Appellate Division and were rejected by that Court.

[5] Such evidence was received during the suspended hearing held after the Appellate Division remand.

2333 (1989). That argument must surely be surprising to Justice Scalia and to the three other members of the Court who concurred with him. It must also be surprising to Justice Stevens who, in his concurrence in *Michael H.*, acknowledges the importance of "enduring family relationships" 109 S. Ct. at 2347.

Respondents' claim that their relationship should be treated as "a protected family unit under the historic practices of our society" (Resp. Br., p. 12) is both factually untenable and, more important, off the legal mark. Surely, our society does not afford protection to a relationship so permeated with violence and disrespect for law.[6] And the issue here is not whether, on the facts, Respondents had a "family unit"[7]. The issue is whether a six month cohabitation period is an appropriate and permissible means for determining, for purposes of the adoption of newborns, whether the unwed father had formed a "protected family unit". The Court of Appeals below explicitly held the absence of a family unit is unimportant since unwed fathers should be recognized as possessing inchoate opportunity interests, despite the absence of any meaningful relationship with mother or child. (A-12, A-13, 76 N.Y.2d at 404, 559 N.Y.S.2d at 862).

Respondents' contention that the law is "well settled" is belied by the Court of Appeals' acknowledgment that it was addressing an "open question" (A-11; 76 N.Y.2d at 401-402, 559 N.Y.S.2d at 861).

The argument that Miguel T.'s participation at a best interest hearing is not sufficient because he lacks substantive rights at such hearing is unavailing. (See Resp. Br., p. 16, n. 6). Respondents have grossly misrepresented New York law to this Court. *Matter of Male F.*, 97 Misc.2d 505, 411 N.Y.S.2d 982

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[6] Respondents each have separately requested, on numerous occasions, judicial assistance to protect each from the abuse of the other.

[7] Miguel T. testified below that, as late as November 1988, months after placement, there was no intact family. (Law Guardian Br., p. 8). The Appellate Division termed Miguel T.'s efforts to establish a substantial family unit "woefully inadequate". (A-27).

(Surrogate's Court Bronx County 1978), cited by Respondents, involved the form of notice to be given the unwed father. The court granted an application by adoptive parents for permission to omit their names and addresses from the process to be served on the natural father. The court held that *process* could fall into the wrong hands and the privacy interests of adoptive parents and children warranted omitting names and addresses, provided that sufficient information was provided to allow the unwed father to make a considered judgment as to whether or not he should appear in the proceeding. 411 N.Y.S.2d at 987-988.[8] The court pointedly observed that the unwed father would obtain more information once he elected to appear. 411 N.Y.S.2d at 988.[9]

Male F. expressly confirms that those fathers who are entitled to notice are given full right to participate at a best interest hearing. As the court stated: "Naturally flowing from a right to notice is the right of a putative father to be heard, if he wishes, on the subject of the disposition of his children before a final determination is reached which can affect his relationship, if any, with the child." 411 N.Y.S.2d at 986.[10] Miguel T. is not entitled under this Court's prior precedents to the invalidation of a statutory scheme which protects the interests of viable family units, particularly where his "rights" have been protected through his participation at a best interests inquiry.

As shown in the Petition and in the Law Guardian's Brief, there are compelling reasons for this Court to grant the writ and review the determination of the Court of Appeals.

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[8] The court held that process should disclose the age of the adoptive parents, their marital history, religious faith, occupations, annual income, manner of obtaining custody, etc. 411 N.Y.S.2d at 987.

[9] In this matter, Miguel T. was provided with all required information (including the names and addresses of Petitioners).

[10] Examination of the record of the now-suspended hearing after remand will confirm the extensive participation of Miguel T., by his attorney, on all issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: White Plains, New York
November 15, 1990

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